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Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

HARVEY F. GARLOTTE,
PETITIONER

VS.

KIRK FORDICE,
RESPONDENT

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Harvey F. Garlotte, pro se
X60710, SMCI U-14
P.O. Box 1419
Leakesville, MS 39451

QUESTION(S) PRESENTED

FOR THE PURPOSES OF TITLE 28 U.S.C.A. §§2241 AND 2254, IS AN OFFENDER "IN CUSTODY" DURING THE COMBINED LENGTH OF HIS CONSECUTIVE SENTENCES ON EITHER OF THE SENTENCES?; WHEN THE STATE COMMUTES THE CONSECUTIVE SENTENCES TO A TOTAL COMBINED AND AGGREGATE TERM?; WHEN HE HAS TECHNICALLY SERVED THE FIRST OF THE CONSECUTIVE SENTENCES?; WHEN THE FIRST OF THOSE SENTENCES, THOUGH TECHNICALLY EXPIRED, CONTINUES TO DIRECTLY AFFECT THE SECOND SENTENCE?; WHEN HE HAS DILIGENTLY CHALLENGED THE UNDERLYING CONVICTION AND DURING EXHAUSTING HIS STATE REMEDIES THE SENTENCE TECHNICALLY EXPIRED?

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PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Petitioner, Harvey F. Garlotte (Garlotte), respectfully request that this Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit finding that the district court did not have jurisdiction to entertain Garlotte's federal habeas corpus proceedings challenging the validity of his state court conviction because it was the first of two consecutive sentences that he is presently serving and he had technically completed the service of that first consecutive sentence.

OPINION BELOW

The opinion of the court of appeals is reported as **Garlotte v. Fordice**, 29 F.3d 216 (5th Cir. 1994), and is copied at Appendix-A attached hereto. The unpublished Report and Recommendation of the magistrate judge dated February 13, 1992, is copied as Appendix-B attached hereto. The Order of the district court adopting the Report and Recommendation as the

finding of that court, dated June 3, 1992, is copied as Appendix-C attached hereto. The unpublished Judgment of the district court, dated June 3, 1992, dismissing the habeas proceedings with prejudice is copied as Appendix-D attached hereto.

JURISDICTION

The court of appeals decision in this matter was filed and issued on August 19, 1994. No petition for rehearing was filed. This Court's jurisdiction is invoked pursuant to Title 28 U.S.C.A. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Amendment 14 to the United States Constitution is set forth in Appendix-H attached hereto.

Title 28 U.S.C.A. Section 2241 is set forth in Appendix-I attached hereto.

Title 28 U.S.C.A. Section 2254 is set forth in Appendix-J attached hereto.

Miss. Code Ann. Section 47-5-138 (as amended 1986) is set forth in Appendix-K attached hereto.

Miss. Code Ann. Section 47-5-139 (as amended 1986) is set forth in Appendix-L attached hereto.

Miss. Code Ann. Section 47-5-142 (as amended 1985) is set forth in Appendix-M attached hereto.

Miss. Code Ann. Section 47-5-138 (as amended 1992) is set forth in Appendix-N attached hereto.

Miss. Code Ann. Section 47-5-139 (as amended 1992) is set forth in Appendix-O attached hereto.

Miss. Code Ann. Section 47-5-142 (as amended 1992) is set

forth in Appendix-P attached hereto.

Miss. Code Ann. Section 47-7-3 (as amended 1993) is set forth in Appendix-Q attached hereto.

Miss. Code Ann. Section 99-19-23 (1972) is set forth in Appendix-R attached hereto.

STATEMENT OF THE CASE

On September 16, 1985, your Petitioner, Harvey F. Garlotte (Garlotte), plead guilty, within the Circuit Court of Lamar County, Mississippi, to three separated charges during the same guilty plea qualification hearing. All three charges were initially prosecuted and begun in Marion County, Mississippi. However, Garlotte's marijuana charge, being Cause No. 4208-2 within the Circuit Court of Marion County, was transferred by change of venue to the Circuit Court of Lamar County, Mississippi, where it was assigned Cause No. 6011-2. Garlotte was charged with murder in the other two cases, being Cause No's 4230-2 and 4231-2 within the Circuit Court of Marion County, Mississippi. At Garlotte's guilty plea hearing in Cause No. 6011-2, on September 16, 1986, within the Circuit Court of Lamar County, Mississippi, he also plead guilty to the two murder charges. No change of venue was made in the murder cases. However, it was agreed by stipulation that those two charges would remain on the docket in the Circuit Court of Marion County, Mississippi, though Garlotte was in fact pleading guilty within the Circuit Court of Lamar County.

Garlotte was sentenced to three years upon his guilty plea in the marijuana case. Upon his guilty pleas to the two murders,

he was sentenced to two life sentences concurrent with each other but, consecutive to the three year sentence imposed in Cause No. 6011-2.

On September 19, 1986, Garlotte was transferred from the county jail to the state penitentiary. Prior to being sent to prison, Garlotte had no knowledge of the workings or technicalities of the law or court procedures; he did not even know that such things as law libraries existed. After being sent to prison and finding out that a law library was available, in late November, 1986, Garlotte was allowed, for the first time, to attend a law library (he had been signing up repeatedly to attend but was not allowed to). Thereafter, he attended every chance he could (though suffering many adverse consequences for asserting and taking advantage of his right to utilize the law library) in an attempt to learn the law and the laws relating to guilty pleas particularly: he had felt since pleading guilty, and prior thereto, that he should not have done so. As noted below, he filed several post conviction proceedings in the state and federal courts, acting **pro se**. He could not afford an attorney and, as can be determined by the fact that he felt compelled to file a second post conviction regarding his marijuana conviction, he filed his first post conviction in that proceeding without having the knowledge of the law that he should have acquired prior thereto. He did what he could and the best he could, on his own.

On September 25, 1986, Garlotte submitted to the Circuit Court of Lamar County, Mississippi, a Motion to Vacate Conviction

seeking that the court allow him to withdraw his guilty plea to the marijuana charge in Cause No. 6011-2. However, though received by the clerk in September, 1986, that motion was not filed until November 3, 1986. That post conviction motion was assigned Cause No. PC-13 (PC-13) and was summarily denied on the same date it was filed, November 3, 1986.

Garlotte filed a timely appeal of the denial of his post conviction in Cause No. PC-13 and that appeal was denied by the Mississippi Supreme Court on August 10, 1988, with rehearing being denied on September 28, 1988. That decision is reported at **Garlotte v. State**, 530 So.2d 693 (MS 1988).

On December 27, 1988, Garlotte submitted to the Mississippi Supreme Court, regarding his marijuana conviction in Cause No. 6011-2, an Application for Leave to Proceed in Trial Court and a second Motion to Vacate Conviction. These were summarily denied without opinion by the Mississippi Supreme Court on January 18, 1989.

On October 6, 1989, as soon as he possibly could (at the time he had matters pending in two different courts regarding his murder convictions, and conditions of confinement that required his time and attention) Garlotte submitted to the United States District Court for the Southern District of Mississippi, Hattiesburg Division, his federal habeas corpus challenging the legality of his guilty plea to the marijuana charge. That case was assigned Case No. H89-0187. The district court had jurisdiction to entertain the habeas proceedings pursuant to Title 28 U.S.C.A. §§2241 and 2254.

On August 29, 1990, the U.S. magistrate judge issued a Report and Recommendation recommending that Garlotte's habeas proceedings be dismissed for failure to exhaust state remedies. (Both the respondent and magistrate judge overlooked Garlotte's second state post conviction proceedings which contained the allegedly unexhausted issues. The respondent later conceded that Garlotte had in fact exhausted his state remedies regarding each of the issues he presented within his federal habeas petition. See Appendices-E and F attached hereto.) On June 25, 1991, the district court judge remanded the matter to the magistrate judge for reconsideration. On February 13, 1992, (after the case was reassigned) a second Report and Recommendation was issued and the magistrate judge then recommended that the petition be denied. See Appendix-B. On June 3, 1992, the district court judge adopted the magistrate judge's Report and Recommendation of February 13, 1992, and entered a final judgment. See Appendices-C and D. Garlotte then petitioned the district court for a certificate of probable cause. The district court refused to issue the certificate and Garlotte then petitioned a circuit judge of the United States Court of Appeals for the Fifth Circuit for a certificate of probable cause. On March 3, 1994, the Honorable John M. Duhe, Jr., Circuit Court Judge, granted Garlotte's request for a certificate of probable cause, and ordered Fordice to file a brief on the issues. The Order granting the certificate of probable cause is copied in Appendix-G attached hereto. The case in the United States Court of Appeals for the Fifth Circuit was styled **Garlotte v. Fordice**,

and assigned Case No. 92-7396

On April 4, 1994, Fordice submitted his "Brief of Respondent-Appellee." Within that brief, Fordice, for the first time, asserted that Garlotte had completed the service of his three year sentence on the marijuana conviction on June 1, 1986. Upon those alleged facts, Fordice, within his brief and for the first time, urged that, because Garlotte had allegedly completed the service of his three year sentence at the time of the filing of his habeas petition in the district court, the district court did not have jurisdiction to entertain Garlotte's habeas petition as he was not "in custody" for the purposes of Title 28 U.S.C.A. §§2241(c) or 2254(a) on the marijuana conviction at the time of the filing of the habeas petition. Fordice based his argument on this Court's interpretation of the "in custody" requirement of Title 28 U.S.C.A. §2254 as expressed in **Maleng v. Cook**, 490 U.S. 488, 109 S.Ct. 1923, 104 L.Ed.2d 540 (1989).

On May 2, 1994, Garlotte submitted to the court of appeals his "Appellant's Reply Brief." Within that brief Garlotte asserted, **inter alia**, that under the decision of this Court in **Peyton v. Rowe**, 391 U.S. 54, 88 S.Ct. 1549, 20 L.Ed.2d 426 (1968), decisions of other courts of appeals', the applicable statutes of the State of Mississippi, and the policies and practices of the Mississippi Department of Corrections in calculating sentences, he was in fact, presently and at the time of the filing of the habeas petition, in custody on his marijuana conviction for the purposes of Title 28 U.S.C.A. §§2241 and 2254.

The court of appeals, within its opinion issued August 19,

1994 (Appendix-A), found and held that under this Court's decision in **Maleng, supra**, Garlotte was not "in custody" on his marijuana conviction for the purposes of Title 28 U.S.C.A. §2254 at the time of the filing of his habeas petition in the district court and, therefore, the district court lacked jurisdiction to entertain those proceedings. The appeals court made this decision even though, under Mississippi law and per the policies and practices of the Mississippi Department of Corrections, Garlotte's consecutive sentences are combined for a total aggregate term for the purposes of earned time and parole eligibility, and its acceptance that Garlotte would receive a benefit in the form of being eligible for parole earlier should the marijuana conviction be vacated. **Garlotte v. Fordice**, 29 F.3d, at 218. See Appendices-K through V.

Pursuant to Mississippi law, if Garlotte were successful in his challenge to his marijuana conviction, his concurrent life sentences would begin on June 6, 1985, the day he turned himself in and was arrested on the murder charges, rather than March 1, 1986. See Appendix-R, Miss. Code Ann. 1972, §99-19-23 and **Garlotte v. Fordice**, 29 F.3d, at 217. Garlotte must serve ten years on the life sentence(s) before becoming eligible for parole. See Appendix-Q.

Under Mississippi law, an "offender under two (2) or more consecutive sentences shall be allowed commutation based upon the total term of the sentences." Miss. Code Ann. (as amended 1986), §47-5-139(3) (Appendix-L), and as amended 1993, §47-5-139(2). See, also, Appendix-S. Hence, Garlotte's three year sentence in

the case **sub judice** becomes a part of his life sentence(s) which he is presently serving. This was the law at the time Garlotte was sentenced in 1985 and remains the law. See note "Sources" in Appendix-L.

Garlotte is presently eligible for parole on March 1, 1996. **Garlotte v. Fordice**, 29 F.3d, at 217. If he were successful in his challenge to his marijuana conviction, he would be eligible for parole on June 6, 1995, after serving 10 years on his life sentence(s). Miss. Code Ann. 1972, §47-7-3. This was the law when Garlotte was sentenced and remains to be the law on that issue.

In 1992 the Mississippi Legislature amended the Mississippi Earned Time Statutes. See Appendix-N. Based upon those amended statutes, the Mississippi Department of Corrections, in November 1992, recalculated Garlotte's earned time on his three year sentence for the marijuana conviction in the case **sub judice**. This action belies Resondent Fordice's argument that Garlotte had completely served and discharged from his marijuana conviction on June 1, 1986. See Appendices-T and V. When the Mississippi Department of Corrections recomputed Garlotte's three year sentence pursuant to the change in the laws in 1992, they credited him with six months of meritorious earned time and subtracted that additional six months from his parole eligibility date (though mistakenly doing so as only two months could by law be subtracted form the one year mandatory service before being eligible for parole. See Appendices-O and Q.). Compare the time periods stated within Appendices-T, U and V.

If Garlotte, as Respondent Fordice contends, had completed the service of and discharged from his sentence on his marijuana conviction on June 1, 1986, why was the calculation of that sentence affecting his parole eligibility and earned time in 1992 when there was a change in the laws? Until the earned time and parole laws changed in 1992, Garlotte was eligible for parole on May 1, 1996. See Appendix-U. When the Mississippi Department of Corrections recalculated Garlotte's sentences in 1992 as a result of those changes in the law, they determined he was now eligible for parole on December 2, 1995, (though mistakenly because, by law, Garlotte cannot be eligible for parole until March 1, 1996, at the earliest, under his present sentences). See Appendix-T.

As noted above, Garlotte has been continuously confined on consecutive sentences since June 6, 1985, under Mississippi law those sentences are commuted for a total aggregate term, and the first of those consecutive sentences, though technically completed, continues to effect the total term of his present incarceration, his receipt of earned time and his parole eligibility date.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted for four reasons: (1) The petition presents an issue resolved by implication by this Court in **Peyton, supra**, but not specifically and unequovically decided by the Court; (2) The opinion below directly conflicts with the decisions of other courts of appeals' on the same issue; (3) The decision below, by implication, conflicts with the prior decisions of this Court; and (4) The petition presents a

substantial federal question that has not previously been specifically and unequivocally decided by this Court but should be.

1.

This Court, in **Peyton v. Rowe**, 391 U.S. 54, 88 S.Ct. 1549, 20 L.Ed.2d 426 (1968) considered the question of whether prisoners serving consecutive sentences could challenge, on federal habeas corpus, the underlying convictions the sentences for which they had not yet begun to serve. In applying and interpreting the custody requirements of 28 U.S.C. §§2241 and 2254, this Court stated:

> "However, in common understanding 'custody' comprehends respondents' status for the entire duration of their imprisonment. Practically speaking, Rowe is in custody for 50 years, or for the aggregate of his 30- and 20-year sentences. For purposes of parole eligibility, under Virginia law he is incarcerated for 50 years. Va. Code Ann. §53-251 (1967); see n. 3, supra. Nothing on the face of §2241 militates against an interpretation which views Rowe and Thacker as being 'in custody' under the aggregate of the consecutive sentences imposed on them. Under that interpretation, they are 'in custody in violation of the Constitution' if any consecutive sentence they are scheduled to serve was imposed as the result of a deprivation of constitutional rights. This approach to the statute is consistent with the canon of construction that remedial statutes should be liberally construed."

Peyton, 88 S.Ct. at 1549. In overruling its prior decision on the issue in **McNally v. Hill**, 293 U.S. 131, 55 S.Ct. 24, 79 L.Ed. 238 (1934), the Court went on to say that, "[w]e overrule **McNally** and hold that a prisoner serving consecutive sentences is 'in custody' under any one of them for purposes of §2241(c)(3). This interpretation is consistent with the statutory language and

with the purpose of the writ of habeas corpus in the federal courts." **Peyton**, 88 S.Ct. at 1556.

In the case **sub judice**, like Rowe and Thacker, Garlotte is serving consecutive sentences. See Appendices A and T - V. Also, like Rowe and Thacker, Garlotte's consecutive sentences are combined for a total aggregate term. See Appendices L, O and S. And, like Rowe and Thacker, if Garlotte were to be succesful in his challenge to the conviction in the case **sub judice**, his parole eligibility date would be advanced. See Appendices A, Q, R, S and T - V.

Under this Court's decision in **Peyton, supra**, though the situation is reversed, Garlotte is "in custody" for the purposes of 28 U.S.C. §§2241 and 2254, since an offender "serving consecutive sentences is 'in custody' under any one of them." **Peyton**, 88 S.Ct. at 1556.

Thus, in **Peyton** this Court implicitly held that even if the offender has technically completed the service of the first of his consecutive sentences, he is nevertheless still "in custody" for the purposes of §§2241 and 2254.

2.

In the case **sub judice** the Court of Appeals held that an offender serving consecutive sentences can never challenge the legality of the first of those sentences if he has technically completed the service of that sentence, as he is not in custody under that sentence/conviction to meet the "in custody" requirements of 28 U.S.C. §§2241 or 2254. See Appendix A.

The U.S. Court of Appeals for the Fifth Circuit reached its decision in **Garlotte v. Fordice**, 39 F.3d 216 (5th 1994) by relying upon this Court's decision in **Maleng v. Cook**, 490 U.S. 488, 109 S.Ct. 1923, 104 L.Ed.2d 540 (1989). "The question presented [in **Maleng** was] whether a habeas petitioner remains 'in custody' under a conviction after the sentence imposed for it has fully expired, merely because of the possibility that the prior conviction will be used to enhance sentences imposed for any subsequent crimes of which he is convicted." The Court answered that question in the negative. **Id.**, 109 S.Ct. at 1926.

The U.S. Court of Appeals for the Eighth Circuit has also, relying upon **Maleng**, determined that an offender serving consecutive sentences in not "in custody" on the first of those sentences if it has technically expired. **Allen v. Dowd**, 964 F.2d 745 (8th Cir. 1992).

Nevertheless, the courts in the following cases have held that **Maleng** is not controlling when consecutive sentences are at issue, but that **Peyton v. Rowe, supra**, is. In **Bernard v. Garraghty**, 934 F.2d 52 (4th Cir. 1991), the "appeal raise[d] the issue of whether a prisoner serving the second of two consecutive state sentences is 'in custody' for purposes of bringing a federal habeas corpus challenge against the first sentence already served." **Id.**, at 53. In answering that question the **Bernard** Court stated:

> "We find that **Peyton** and not **Maleng** controls this case. **Peyton** sets forth quite clearly the law concerning the custody status of prisoners who are serving consecutive sentences: for such prisoners, custody for habeas purposes is defined not by any one particular sentence but by the

> aggregate of the sentences. 391 U.S. at 64, 88 S.Ct. at 1554-55. **Maleng** does not affect **Peyton** because in **Maleng** the Court did not address consecutive sentences, nor did it attempt to define when the first sentence is discharged."

Bernard, 934 F.2d at 54.

Also, in **Bernard**, as in the case **sub judice**, as additional support for its holding the court acknowledged that under Virginia law as exist presently and when **Peyton** was before this Court, a persons consecutive sentences are commuted to a total combined, or aggregate term, for parole eligibility purposes. And, that under such statutes a person is not actually serving two separate periods, or sentences, but one total and combined period. **Bernard**, 934 F.2d at 55. Garlotte's sentences, under Mississippi Law, and for parole and earned time purposes, are considered as one period of time. See Appendices L, O, Q, S, T - V. Additionally, as noted **supra** at pp. 9-10, as late as 1992 Garlotte's earned time and parole eligibility dates, in relation to the conviction in the case **sub judice**, were being recalculated and realigned due to a 1992 change in the Mississippi earned time statutes.

In **Fawcett v. Bablitch**, 926 F.2d 617, 618 (7th Cir. 1992), the Court also found that **Peyton** and not **Maleng** was controlling where consecutive sentences were at issue and stated that "a prisoner serving consecutive sentences is 'in custody' under any one of them for purposes of collateral attack." See, also, **Fortner v. Singletary**, 797 F. Supp. 951, 954 (M.D. FL 1992).

In **Fox v. Kelso**, 911 F.2d 563, 568 (11th Cir. 1990), the court held that **Maleng** is not controlling where the offender

will receive credit against his current sentences for the time served on the prior sentence(s). A similar result was reached in **Harrison v. State of Indiana**, 597 F.2d 115, 117 (7th Cir. 1979), and in that case the Court determined that **Peyton** was applicable and controlling when the factual situations were reversed, that is, where the offender challenged a consecutive sentence he had, technically, already served, rather than one to be served in the future.

As noted, there is a conflict and no little amount of confusion among the Circuit Courts of Appeals regarding the "in custody" requirement of 28 U.S.C. §§2241 and 2254 when consecutive sentences are at issue and, concerning the application of this Court's decisions in **Peyton and Maleng, supra**.

3.

The court's decision in **Garlotte v. Fordice**, 29 F.3d 216 (5th Cir. 1994), is in conflict with this Court's holding in **Peyton, supra**, wherein this Court held "that a prisoner serving consecutive sentences is 'in custody' under any one of them for purposes of §2241(c)(3)," and, by implication, §2254.

4.

As can be ascertained by the voluminous case law regarding the interpretation of "in custody," some of which is noted hereinabove, there can be no doubt that the case **sub judice** presents a substantial federal question. Though seemingly layed to rest and answered in the affirmative in **Peyton, supra**, the question was not specifically and unequovically, according to the

court in **Garlotte v. Fordice, supra**, decided and determined by this Court previously, **Peyton**, notwithstanding.

5.

The United States Congress has not deemed it advisable to amend either 28 U.S.C. §§2241 or 2254 in the 36 years since this Court's decision in **Peyton, supra**, was rendered. This Court has stated that "when [its] earlier opinion gives a statutory provision concrete meaning, which Congress elects not to amend during the ensuing [years], [its] duty to respect Congress' work product is strikingly similar to the duty of other federal courts to respect," the work product of this Court. **Rodriguez De Quijas v. Shearson/American Exp., Inc.**, 490 U.S. 477, 109 S.Ct. 1917, 1923, 104 L.Ed.2d 526 (1989).

6.

In **Garlotte v. Fordice, supra**, the court of appeals chose not to follow this Court's decision in **Peyton, supra**, which had direct application to the case **sub judice**. In doing so the court of appeals erred and effectively overruled this Court's decision in **Peyton**. "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the perogative of overruling its own decisions." **Rodriguez De Quizas**, 109 S.Ct. at 1921-22.

7.

Under the doctrine of **stare decisis** this Court's holding in **Peyton, supra**, that for the purposes of 28 U.S.C. §§2241 and 2254

an offender "serving consecutive sentences is 'in custody' under any one of them" (**Peyton**, 88 S.Ct. at 1556) is the controlling rule of law regarding the issues herein and should be applied to Garlotte's case to find that the district court and court of appeals did and does have jurisdiction to entertain his federal habeas corpus proceedings in the case **sub judice**.

In circumstances such as these regarding the Court's decision in **Peyton, supra**, the Court will follow the normal presumption of **stare decisis**. **Cf. N.L.R.B. v. International Longshoreman's Ass'n**, 473 U.S. 61, 105 S.Ct. 3045, 3058, 87 L.Ed.2d 47 (1985), and cases cited therein.

8.

To find that Garlotte is not "in custody" for the purposes of 28 U.S.C. §§2241 or 2254 regarding his marijuana conviction in the case **sub judice** would deny and deprive him of his rights and privileges as guaranteed under the United States Constitution, Article IV, §2, cl. 1, and Amendment 14, providing for the equal protection of the laws.

It makes no sense to say that if Garlotte's murder conviction sentences were "enhanced" by the marijuana conviction he could challenge his marijuana conviction, vicariously, by challenging his murder convictions. See **Garlotte v. Fordice**, 29 F.3d 216 (5th Cir. 1994), and **Maleng v. Cook**, 490 U.S. 488, 109 S.Ct. 1923, 104 L.Ed.2d 540 (1989).

Garlotte was required to exhaust his state remedies in challenging his conviction in the case **sub judice before** he could proceed into federal court. 28 U.S.C. 2254(b), **Murray v.**

Carrier, 477 U.S. 478, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986). To find that he is no longer "in custody" because he did exactly what the law required of him, would be a violation of his rights to due process and equal protection.

Garlotte's sentences on his murder convictions are delayed from beginning for approximately nine months, for parole consideration purposes, and approximately 12-16 months otherwise. As such, this is surely as significant as if the murder sentence(s) had been enhanced by the marijuana conviction and is not merely a "collateral consequence" of the marijuana conviction as the court of appeals would have it. **Garlotte**, 29 F.3d at 218. Surely beginning the service of a sentence a year earlier is a "positive and demonstrable" nexus between sentences to justify being considered "in custody." **Id.** **Willis v. Collins**, 989 F.2d 187 (5th Cir. 1993). To find otherwise would be an arbitrary distinction in violation of Garlotte's rights to due process and equal protection.

9.

This Court will grant certiorari to review its own prior decisions, and when clarification of a rule of law is feasible. **United States v. Ross**, 456 U.S. 798, 102 S.Ct. 2157, 2162, 72 L.Ed.2d 572 (1982).

This Court will grant certiorari when there is a conflict between the courts of appeals on the same issue. **Immigration and Naturalization Service v. Errico**, 385 U.S. 214, 87 S.Ct. 473, 475, 17 L.Ed.2d 318 (1966), and Rule 10.1(a), Rules of The Supreme Court.

This Court will grant certiorari when a court of appeals has decided an important question of federal law that has not been specifically and unequovically decided by this Court, but should be, and when a court of appeals has decided a question of federal law in a way that conflicts with the applicable decisions of this Court. Rule 10.1(c), Rules of The Supreme Court.

Garlotte submits that this Court should grant certiorari in these proceedings to specifically and explicitly rule that an offender serving consecutive sentences is "in custody" on the first of those sentences even if it has technically expired, and, further, to resolve the confusion arising from this Court's decisions in the **Peyton** and **Maleng** cases, **supra**, and the confusion and conflicts among and between the courts of appeals on the issue.

CONCLUSION

For the reasons stated hereinabove, Garlotte respectfully request that this Court issue a writ of certiorari to review the judgment and opinion of the court of appeals in these proceedings.

Respectfully submitted this the 3rd day of November, 1994.

Harvey F. Garlotte

Harvey E. Garlotte, **pro se**
X60710, SMCI U-14
P.O. Box 1419
Leakesville, MS 39451

APPENDIX—Continued

The introducing broker was not included in the arbitration clause between Taylor and Prudential; because of that, it is reasonable to draw the inference that the parties did *not* intend for the defendants, the introductory firm (IAI) and its agent (Goldberg), to be a beneficiary of the arbitration clause. The plain meaning of the chosen language is clear. The defendants cannot compel arbitration.

III. CONCLUSION

For the reasons set forth above, IAI and Goldberg's motion to stay proceedings and compel arbitration, or, alternatively, to dismiss, is denied. An order to that effect will issue concurrently with this memorandum opinion.

SIGNED this 14th day of June, 1993.

/s/ William Wayne Justice
William Wayne Justice
United States District Judge



Harvey F. GARLOTTE, Petitioner-Appellant,

v.

Kirk FORDICE, Governor, Respondent-Appellee.

No. 92-7396
Summary Calendar.

United States Court of Appeals,
Fifth Circuit.

Aug. 19, 1994.

Petitioner, who had received consecutive sentences for possession of marijuana with intent to deliver and for murder, filed habeas corpus petition challenging marijuana conviction. The United States District Court for the Southern District of Mississippi, Charles W. Pickering, Sr., J., dismissed petition, and petitioner appealed. The Court of Appeals held that petitioner was no longer "in custody" on marijuana conviction, and thus there was no subject matter jurisdiction over his petition.

Affirmed.

1. Habeas Corpus ⇐816

Challenge to subject matter jurisdiction in habeas proceeding could be raised for first time on appeal, because it could not be waived. 28 U.S.C.A. § 2254.

2. Habeas Corpus ⇐252

Federal district courts lack subject matter jurisdiction to entertain habeas actions if, at time habeas petition is filed, petitioner is not "in custody" under conviction or sentence which petition attacks. 28 U.S.C.A. § 2254.

3. Habeas Corpus ⇐253

Petitioner who received consecutive sentences for possession of marijuana with intent to deliver and for murder was not "in custody" under marijuana conviction, and district court lacked subject matter jurisdiction over petition for habeas corpus relief challenging that conviction, where defendant had been ordered to serve marijuana sentence first, he filed habeas petition after he was discharged from marijuana conviction, and marijuana conviction was not used to enhance life sentences imposed for murder; it was not enough that expired sentence delayed time for which petitioner could receive credit for time served on current sentence or that his parole consideration date was delayed by expired sentence. 28 U.S.C.A. § 2254.

See publication Words and Phrases for other judicial constructions and definitions.

Harvey F. Garlotte, pro se.

Jo Anne M. McLeod, Sp. Asst. Atty. Gen., Mike Moore, Atty. Gen., Jackson, MS, for appellee.

Appeal from the United States District Court for the Southern District of Mississippi.

Before SMITH, EMILIO M. GARZA and PARKER, Circuit Judges.

PER CURIAM:

Petitioner Harvey F. Garlotte ("Garlotte") brings a *habeas corpus* action pursuant to 28 U.S.C. § 2254, challenging a 1985 state conviction for possession of marijuana. The district court, adopting the magistrate judge's Report and Recommendation, dismissed the petition for failure to exhaust state remedies without requiring the respondent to file an answer. We granted Garlotte's request for a Certificate of Probable Cause, ordering Respondent Kirk Fordice ("Fordice") to brief the issue whether the district court prematurely dismissed Garlotte's petition without requiring an answer or conducting an evidentiary hearing. Concluding that under recent United States Supreme Court precedent Garlotte was not "in custody" for purposes of § 2254, we affirm the district court's dismissal of the petition, but on the separate ground of lack of jurisdiction pursuant to 28 U.S.C. § 2254.

FACTS AND PROCEDURAL HISTORY

In 1985, Garlotte pleaded guilty to one count of possession with intent to deliver or sell one ounce or less of marijuana and was sentenced to three years imprisonment. On the same day he pleaded guilty to two counts of murder and received two life sentences, which the court ordered to run concurrently. The court also ordered that the concurrent life sentences were to run "consecutive, and after" the three year marijuana conviction. Garlotte did not appeal his marijuana conviction, and his two state post-conviction motions were denied. He is currently eligible for parole consideration on March 1, 1996.

In 1989, Garlotte filed a federal petition for *habeas corpus* relief challenging the 1985 marijuana conviction. Fordice filed a motion to dismiss for failure to exhaust state habeas remedies, and the magistrate judge recommended that the petition be dismissed with prejudice. The district court remanded the matter to the magistrate for reconsideration.

On remand, the magistrate recommended dismissing the petition without requiring Fordice to file an answer, concluding that although it was unclear whether Garlotte had exhausted his state remedies, even if they were unexhausted the requirement should be waived because exhaustion would be futile. After reviewing the magistrate's Report and Recommendation, the district court adopted it, dismissed the petition, and denied Garlotte's request for a Certificate of Probable Cause.

DISCUSSION

[1] For the first time on appeal, Fordice argues Garlotte's habeas petition should be dismissed for lack of subject matter jurisdiction because he is not "in custody" within the meaning of 28 U.S.C. § 2254. A challenge to subject matter jurisdiction may be raised for the first time on appeal because it may not be waived. *Hensgens v. Deere & Co.*, 833 F.2d 1179, 1180 (5th Cir.1987), *cert. denied*, 493 U.S. 851, 110 S.Ct. 150, 107 L.Ed.2d 108 (1989). Therefore, we address the question of whether Garlotte is "in custody" under the 1985 marijuana conviction.

[2-3] Federal district courts lack subject matter jurisdiction to entertain § 2254 actions if, at the time the petition is filed, the petitioner is not "in custody" under the conviction or sentence which the petition attacks. *Maleng v. Cook*, 490 U.S. 488, 491, 109 S.Ct. 1923, 1925, 104 L.Ed.2d 540 (1989); see also *Hendrix v. Lynaugh*, 888 F.2d 336 (5th Cir. 1989). Fordice argues that under *Maleng*, Garlotte is not "in custody" because his three year sentence for the marijuana conviction was fully expired before he filed his habeas petition with the district court. Specifically, Fordice contends that according to Garlotte's records at the Mississippi Department of Corrections, he was discharged from the marijuana conviction on June 1, 1986. He did not file his petition for habeas relief in federal court until 1989, after he was already serving time for the two concurrent life sentences for murder. Therefore, because the marijuana conviction he now attacks was not used for enhancement purposes for the concurrent life sentences for murder, and because the marijuana conviction is fully expired, Garlotte is not "in custody" for purposes of § 2254.

Garlotte does not challenge Fordice's contention that his three year marijuana sentence has expired, but argues instead that the Supreme Court's decision in *Peyton v. Rowe*, 391 U.S. 54, 88 S.Ct. 1549, 20 L.Ed.2d 426 (1968), holding that a prisoner serving consecutive sentences is "in custody" under any one of the sentences, controls this case. Garlotte further argues that there exists a "positive and demonstrable" nexus between his current custody under the murder sentences and the prior marijuana conviction such that his challenge meets the jurisdictional requirements of § 2254. *Willis v. Collins*, 989 F.2d 187 (5th Cir.1993), quoting *Young v. Lynaugh*, 821 F.2d 1133, 1137 (5th Cir.1987), *cert. denied*, 484 U.S. 986, 108 S.Ct. 503, 98 L.Ed.2d 501 (1987), and *cert. denied*, 484 U.S. 1071, 108 S.Ct. 1040, 98 L.Ed.2d 1004 (1988). Specifically, he contends that but for his marijuana conviction, he would have been eligible for parole consideration on June 5, 1995, instead of March 1, 1996.

This Court has held that a petitioner can challenge a fully expired sentence if the expired sentence delayed the time for which the petitioner could receive credit for time served on the current sentence. *Cappetta v. Wainwright*, 406 F.2d 1238, 1239 (5th Cir.), *cert. denied*, 396 U.S. 846, 90 S.Ct. 55, 24 L.Ed.2d 96 (1969). Since *Cappetta*, however, the Supreme Court stated in *Maleng*:

> We have never held, however, that a habeas petitioner may be "in custody" under a conviction when the sentence imposed for that conviction has *fully expired* at the time the petition is filed.

Maleng, 490 U.S. at 491, 109 S.Ct. at 1925 (emphasis in original). Therefore, to the extent that the Supreme Court's decision in *Maleng* is in conflict with this Court's decision in *Cappetta*, we now follow the rule established by *Maleng*.

In *Peyton*, the Supreme Court held that a petitioner who was serving consecutive sentences imposed by the state court is "in custody" under any one of those sentences. *Peyton*, 391 U.S. at 67, 88 S.Ct. at 1556. Unlike Garlotte, however, the petitioners in *Peyton* were challenging a sentence they had not yet begun to serve. Garlotte attempts only to challenge a sentence that is "fully expired" under the definition established by the Supreme Court in *Maleng*. Therefore, Garlotte's challenge to his "fully expired" marijuana conviction is not controlled by the Supreme Court's decision in *Peyton* because he is not attempting to challenge a sentence he has not yet begun to serve.

As for Garlotte's contention that because his parole consideration date has been delayed by the marijuana conviction a nexus exists between the marijuana conviction and the murder conviction, we find that this argument too must fail. As the Supreme Court stated in *Maleng*:

> [O]nce the sentence imposed for a conviction has completely expired, the collateral consequences of that conviction are not themselves sufficient to render an individual "in custody" for the purposes of a habeas attack upon it.

Maleng, 490 U.S. at 492, 109 S.Ct. at 1926. Because Garlotte's parole delay merely constitutes a collateral consequence of his marijuana conviction, he has failed to allege a "positive and demonstrable" nexus between the marijuana conviction and the murder sentences he is now serving in order to meet the requirements of the *Maleng* exception established by this Court in *Willis*. Having found that Garlotte is not "in custody" for purposes of subject matter jurisdiction, we decline to address the other issues he raises in his petition. Accordingly, we AFFIRM the district court's dismissal, but on the separate ground of the district court's lack of jurisdiction pursuant to 28 U.S.C. § 2254.

WEST KEY NUMBER SYSTEM

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
HATTIESBURG DIVISION

HARVEY F. GARLOTTE — PETITIONEI

VS. — CIVIL ACTION NO. H89-0187(P)

RAY MABUS, ET AL — RESPONDENTS

REPORT AND RECOMMENDATION OF
UNITED STATES MAGISTRATE JUDGE

Harvey Floyd Garlotte pled guilty to the crime of possession of less that one ounce of marijuana with intent to deliver or sell in the Circuit Court of Lamar County, Mississippi on September 16, 1985. He was previously arraigned for the crime December 10, 1984, in Marion County, and his case was assigned to Lamar County on his own motion. Garlotte also pled guilty to two counts of murder on the same day, but he does not now challenge these convictions herein. Garlotte was sentenced to a three-year term in the custody of the Mississippi Department of Corrections for the crime of possession of marijuana with intent to deliver or sell.

Garlotte appealed his conviction directly to the Mississippi Supreme Court, and that court affirmed in Garlotte v. State, 530 So.2d 693 (Miss. 1988). After filing several more unsuccessful post-conviction motions, Garlotte then filed his writ for habeas corpus with this court. The State filed its Motion to Dismiss for Failure to Exhaust on November 20, 1989, and a Report and Recommendation was entered by the Magistrate on August 30, 1990, recommending dismissal. The District Judge entered an Order on

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June 27, 1991, remanding the case to the Magistrate for reconsideration.

Although it is unclear whether or not Garlotte has exhausted his state court remedies on all of his alleged grounds for relief, it appears that a return to the state courts may prove futile. Thus, it is our recommendation that the exhaustion requirement be waived and that Garlotte's petition be considered on the merits.

Garlotte alleges that his conviction is "illegal and void" based on the following grounds which entitle him to relief:

> 1. The Trial Court erred in accepting Petitioner's guilt plea and did not adequately establish and ensure that Petitioner's plea was voluntary, intelligent and knowing.
>
> 2. Petitioner was denied effective assistance of counsel.
>
> 3. The trial court lacked jurisdiction to entertain and/or accept the Petitioner's guilty plea.
>
> 4. Petitioner was subjected to double jeopardy.
>
> 5. Petitioner's sentence was unusual and disproportionate.
>
> 6. Petitioner's guilty plea was the product of undue influence/coercion and/or misleading information.
>
> 7. Petitioner was incompetent at the time of the guilty plea.
>
> 8. Petitioner's guilty plea was not knowing, intelligent and voluntary.[1]
>
> 9. Petitioner was denied full and fair consideration of his *pro se* pleadings by the Mississippi Courts.

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[1] This ground is essentially identical to Ground No. 1.

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(sic)

Garlotte's *primary* attack on his conviction is his allegation that his guilty plea was unlawful for numerous different reasons. Ground Nos. 1, 2, 3, 4, 6, 7, and 8 are all related to the lawfulness of Garlotte's guilty plea, and we shall consider the merits of these grounds as a whole.

We have examined the transcript from the lower court's hearing whereby Garlotte entered his plea of guilty to this crime. We agree with the Mississippi Supreme Court's statement in the direct appeal of this case that "Judge Eubanks conducts one of the most thorough and explicit plea hearings this Court has had the opportunity to read....The issues raised by Garlotte are without merit, totally refuted by the lengthy and explicit record of the guilty plea." Garlotte, 530 So.2d at 694.

Judge Eubanks explained in detail to Garlotte his rights to plead not guilty and have a trial; he questioned Garlotte thoroughly as to whether the plea was freely and voluntarily given and whether or not anyone had coerced or pressured him. As to competency, when Garlotte mentioned his past alcohol and drug problems, Judge Eubanks questioned him in detail as to how long it had been since he had used alcohol and whether it was out of his system or still affecting his judgment. Garlotte confirmed that he was no longer under the influence as he had not used any drugs or alcohol in three months. The court interrogated him regarding his educational background, determining that he had completed his high school degree (by GED) and could read and write. The Judge had the

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opportunity to examine the demeanor of Garlotte and could form an opinion as to whether he was competent; the record certainly confirms the judge's decision.

The record indicates that the Judge *affirmatively* found that Garlotte was competent, that the plea was freely and voluntarily given, that no coercion was involved, and that Garlotte understood his rights.

A plea of "guilty" to a charge has a profound effect on subsequent events in a criminal proceeding. In Boykin v. Alabama, 395 U.S. 238, 242 (1969), the Supreme Court held that a guilty plea to a criminal charge is "more than admission of conduct; it is a conviction." See also, Swift v. Lynn, 870 F.2d 1039, 1041 (5th Cir. 1989); Long v. McCotter, 792 F.2d 1338, 1345 (5th Cir. 1986). Such a plea waives several federal constitutional rights, such as the privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront one's accusers. Long, 792 F.2d at 1345. A valid guilty plea waives all nonjurisdictional defects preceding the plea. United States v. Jennings, 891 F.2d 93, 95 (5th Cir. 1989); See also, United States v. Harper, 901 F.2d 471, (5th Cir. 1990). In Tollett v. Henderson, 411 U.S. 258 (1972), the court held that:

> When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea by showing that the advice

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he received from counsel was not within the standards set forth in McMann.

Id. at 267 (*citing* McMann v. Richardson, 397 U.S. 759 (1970); Cook v. Lynaugh, 821 F.2d 1072, 1075 (5th Cir. 1987).[2]

The United States Supreme Court established in Boykin that as a matter of due process the court record in criminal proceedings must affirmatively disclose that a guilty plea was entered voluntarily and intelligently. See also, Gillard v. Scroggy, 847 F.2d 1141, 1143 (5th Cir. 1988). In Boykin, the court reversed a criminal conviction based upon a guilty plea where the record was "wholly silent" on whether the judge asked the defendant any questions or whether the defendant ever addressed the court. Boykin, 395 U.S. at 240. The rule governing acceptance of guilty pleas has three core concerns: the plea must be free from coercion, the accused must understand the nature of the charges against him, and the accused must know the direct consequences of his guilty plea. United States v. Stumpf, 900 F.2d 842, 844 (5th Cir. 1990). The lower court's interrogation of Garlotte, along with Garlotte's responses, clearly show that these criteria were met.

The court must advise the defendant of the maximum sentence he can receive, and the transcript affirmatively shows that this was done in Garlotte's hearing. United States v. Daniel, 830 F.2d 46,

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[2]The court, in reaching its conclusion in Tollett, relied on a trilogy of cases decided in 1970. See Brady v. U.S., 397 U.S. 742 (1970) (guilty pleas allegedly entered to avoid possibility of death penalty); McMann v. Richardson, 397 U.S. 759 (1970) (confession allegedly coerced); Parker v. North Carolina, 397 U.S. 790 (1970) (guilty plea allegedly entered to avoid possibility of death penalty).

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47 (5th Cir. 1987). However, the Supreme Court held in Hill v. Lockhart, 474 U.S. 52, 55-56 (1985), that in order for a guilty plea to be valid and binding, a trial court is not required to inform a criminal defendant of collateral consequences that might result from the conviction based on the guilty plea. See also, Johnson v. Puckett, 930 F.2d 445 (5th Cir. 1991). In Hill, the court affirmed that the procedures for ensuring that guilty pleas are knowingly and intelligently entered are outlined in Rule 11(c), Federal Rules of Criminal Procedures, and the court stated that the Constitution does not require the states to inform defendants about collateral matters such as parole eligibility. Id. Furthermore, a defendant who has been advised of the maximum prison term he might receive is fully aware of the consequences of his guilty plea. Barbee v. Ruth, 678 F.2d 634 (5th Cir. 1982). Letter perfect compliance with the rule concerning acceptance of guilty pleas is not demanded. Stumpf, supra, at 844 *citing* United States v. Corbett, 742 F.2d 173 (5th Cir. 1984).

The record of the guilty plea hearing affirmatively discloses that Garlotte's plea was voluntarily and intelligently made as required by Boykin. Many of the complaints Garlotte makes regarding his plea were waived by him due to the plea itself under the foregoing law. It is our opinion that all of the grounds alleged by Garlotte regarding his competency and the voluntariness of the plea are without merit.

Garlotte also attacks his guilty plea by alleging in Ground No. 3 that the trial court had no jurisdiction to entertain his

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plea due to the invalidity of the indictment. He concludes (without a supporting factual basis) that the indictment was "detained in a deceitful and malicious manner"; the indictment was not signed by the circuit clerk; the grand jury was not properly empaneled; the indictment was "falsified and altered by the district attorney without leave of court"; the grand jury "was not charged concerning the law in relation to the facts"; the grand jury "was not charged with its duties and obligations as an impartial and unbiased judicial body as required by law"; and, the indictment "did not reflect on its face the true weight of the marijuana".

The sufficiency of a state indictment is not a matter for federal habeas corpus relief unless it can be shown that the indictment is so defective that the convicting court had no jurisdiction. Alexander v. McCotter, 775 F.2d 595, 598 (5th Cir. 1985) *citing* Liner v. Phelps, 731 F.2d 1201, 1203 (5th Cir. 1984); Johnson v. Puckett, 930 F.2d 445 (5th Cir. 1991). For an indictment to be "fatally defective," no circumstances can exist under which a valid conviction could result from the facts provable under the indictment with state law providing the reference point for determining an indictment's sufficiency. Johnson, 930 at 447; Johnson v. Estelle, 704 F.2d 232, 236 (5th Cir. 1983) *cert. denied*, 465 U.S. 1009, 104 S.Ct. 1006, 79 L.Ed.2d 237 (1984). However, if the question of the sufficiency of the indictment is presented to the highest state court of appeals, then consideration of the question is foreclosed in federal habeas corpus proceedings. Liner

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v. Phelps, 731 F.2d at 1203. Furthermore, in Alexander v. McCotter, supra, the United States Court of Appeals for the Fifth Circuit held that:

> An indictment is sufficient if it (1) contains the elements of the offense charged and fairly informs the defendant of the charge against him and (2) enables him to plead an acquittal or conviction and bar a future prosecution for the same offense.

Alexander, 775 F.2d at 599, *citing* United States v. Montemayor, 703 F.2d 109, 117 (5th Cir. 1983).

In Mississippi, all questions regarding the sufficiency of an indictment are determined by reference to Rule 2.05, Uniform Criminal Rules of Circuit Court Practice. Thames v. State, 454 So.2d 486, 487 (Miss. 1984). Also, an indictment which tracks the statutory language is generally sufficient to inform the accused of the charge against him. Cantrell v. State, 507 So.2d 325, 329 (Miss. 1987); Cummins v. State, 515 So.2d 869, 872 (Miss. 1987); Hickombottom v. State, 409 So.2d 1337, 1338 (Miss. 1982).

We have reviewed the allegations regarding the indictment in this matter and find that Garlotte's indictment was not so defective under the above discussed law to deprive the convicting court of jurisdiction over the cause. Some of Garlotte's allegations are merely conclusory in nature and are without a factual basis.

Garlotte alleges that he had previously pled guilty to the marijuana possession charge in city court and that the instant conviction violated the Double Jeopardy Clause of the United States Constitution. The Double Jeopardy Clause provides that no person

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shall "be subject for the same offense to be twice put in jeopardy of life or limb." U. S. Constitution, Article V. It protects against three different evils: a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and multiple punishments for the same offense. North Carolina v. Pearce, 359 U.S. 711, 717 (1969). We find Garlotte's argument on this ground to be without merit, as he offers no supporting facts to validate his conclusion that the two guilty pleas were for the same offense. Further, his guilty plea conviction in this case may have waived any such assertion.

Garlotte also argues in his Ground No. 2 that he was denied effective assistance of counsel. We point out that the transcript reflects the following testimony of Judge Eubanks and Garlotte:

> Q. Now, Mr. Bubba Holder here is your attorney?
> A. Yes, sir.
>
> Q. And he's here in the Courtroom with you, and you have employed him to represent you on these cases?
> A. Yes, sir.
>
> Q. Now, has he discussed this indictment with you?
> A. Yes, sir.
>
> Q. Has he discussed with you what needs to be done to defend you on these cases?
> A. Yes, sir.
>
> Q. All right, did he go over with you what yours rights were on these charges?
> A. I'm not real sure about that one.
>
> Q. Well, I'm going to go over with you again and so you will understand about them before you enter your plea, but he has discussed the cases and what needs to be done to defend you in these cases?

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A. Yes, sir.

Q. And you've discussed those in detail with him?
A. Yes, sir.

Q. And have you given him the information he needs to properly advise you and represent you on these charges?
A. Yes, sir.

Q. All right, you're not holding back any information from him?
A. No, sir.

Q. Now, has he taken sufficient time to go over everything with you?
A. Yes, sir, I believe he has.

Q. Are you satisfied with his services?
A. Yes, sir.

Q. Do you know of anything else that you would want him to do to defend you on these three charges?
A. No, sir.

In order to establish effective assistance of counsel with regard to a guilty plea, Hill v. Lockhart, 474 U.S. 52, 58 (1958), holds that the two-prong test set forth in Strickland v. Washington, 466 U.S. 668 (1984), must be met. See also, Williams v. Smith, 888 F.2d 28, 30 (5th Cir. 1989); United States v. Green, 882 F.2d 999, 1002 (5th Cir. 1989); United States v. Smith, 844 F.2d 203, 208 (5th Cir. 1988).

In Strickland, the Supreme Court held that before post-conviction relief can be granted for ineffective assistance of counsel, the petitioner must establish: (1) that counsel's performance was deficient in that it fell below an objective standard of reasonable professional service; and (2) that this deficient performance prejudiced the defense such that there is a

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reasonable probability that the outcome of the trial has been undermined and the result would have been different. Strickland, 466 U.S. at 687, 688; See also, United States v. Samples, 897 F.2d 193, 196 (5th Cir. 1990); Lavernia v. Lynaugh, 845 F.2d 493 (5th Cir. 1988); Bridge v. Lynaugh, 838 F.2d 770 (5th Cir. 1988); Thomas v. Lynaugh, 812 F.2d 225 (5th Cir. 1987). Thus, both a deficiency and resulting prejudice must be shown. United States v. Lewis, 786 F.2d 1278, 1281 (5th Cir. 1986). A petitioner's failure to establish both prongs of the Strickland test warrants rejection of his claim. Bates v. Blackburn, 805 F.2d 569, 578 (5th Cir. 1986).

Under the deficiency prong of the Strickland test, a petitioner must show that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Strickland, 466 U.S. at 687; see also, Bridge v. Lynaugh, 838 F.2d 770, 773 (5th Cir. 1988). However, the Fifth Circuit has noted the following:

> In determining whether counsel's performance satisfies the requirements of the Sixth Amendment, we must inquire whether, considering all of the circumstances, counsel's performance was reasonable under prevailing professional norms. Judicial scrutiny of counsel's performance must be highly deferential; we must make every effort to eliminate the distorting effects of hindsight and evaluate the conduct from counsel's perspective at the time.

Lavernia v. Lynaugh, 845 F.2d 493, 498 (5th Cir. 1988). In applying the first Strickland criterion, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional competence, or that, under the

circumstances, the challenged action might be considered sound trial strategy. Bridge v. Lynaugh, 838 F.2d at 773 quoting Strickland v. Washington, 466 U.S. at 689; Samples, 897 F.2d at 196. Finally, counsel is given great deference with a strong presumption that counsel has exercised reasonable professional judgment. Martin v. McCotter, 796 F.2d 816, 817 (5th Cir. 1986).

In Hill, supra, the Court stated that in the context of guilty pleas, the first half of the Strickland test is nothing more than a restatement of the standard of attorney competence set forth in Tollett v. Henderson, 411 U.S. 258 (1973) and McMann v. Richardson, 397 U.S. 759 (1970). Both of those decisions hold that where a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases. See, Hill, 474 U.S. at 56.

The petitioner must also affirmatively prove "prejudice" in order to meet the Strickland test. Byrne v. Butler, 845 F.2d 501, 512 (5th Cir. 1988)(citations omitted). In the guilty plea context, "prejudice" occurs if there is a reasonable probability that, but for counsel's errors, the petitioner would not have pleaded guilty and would have insisted on going to trial. United States v. Smith, 844 F.2d 203, 209 (5th Cir. 1988); See also, Czere v. Butler, 833 F.2d 59, 63 (5th Cir. 1987); Uresti v. Lynaugh, 821 F.2d 1099, 1101 (5th Cir. 1987). In the instant case, Garlotte has not even alleged that he would have insisted on going to trial.

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In our opinion, Garlotte has not met his burden of proving ineffective assistance of counsel under the Strickland test and the law as discussed above, and we recommend that no relief be granted on this ground.

Garlotte also alleges in his Ground No. 5 that his three-year sentence, which was the maximum jail sentence allowed under Mississippi law, is unusual and disproportionate. In Rummel v. Estelle, 445 U.S. 263 (1980), the Supreme Court stated that "whatever views may be entertained regarding severity of punishment, whether one believes in its efficacy or its futility, . . . these are peculiarly questions of legislative policy." Rummel, 445 U.S. at 283, n.27, *citing* Gore v. United States, 357 U.S. 386, 393 (1958); see also, Hutto v. Davis, 454 U.S. 370, 374 (1982).

Moreover, the Supreme Court has held that a reviewing court should not consider the severity of a sentence that has been set within statutory limits, particularly on habeas corpus review. Townsend v. Burke, 334 U.S. 736, 741 (1948). The Fifth Circuit has stated, that "while not reviewing the severity of a sentence, this court will, however, carefully scrutinize the judicial process by which punishment was imposed." United States v. Cimino, 659 F.2d 535, 537 (5th Cir. 1982); see also, United States v. Clements, 634 F.2d 183, 186 (5th Cir. 1981); United States v. Cauazos, 530 F.2d 4, 5 (5th Cir. 1976); Smith v. Wainwright, 664 F.2d 1194, 1196 (11th Cir. 1976); United States v. Fay, 267 F.2d 507, 510 (2nd Cir. 1959). As long as the trial court stays within statutory bounds

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and respects procedural safeguards, the sentence may be reversed only for arbitrary or capricious abuse of discretion. United States v. Wheeler, 802 F.2d 778, 783 (5th Cir. 1986); United States v. Garcia, 693 F.2d 412, 415 (5th Cir. 1982).

The three-year sentence which Garlotte received was the maximum jail sentence for his crime, but he was not *fined* as the law allowed. Thus, the lower court did not impose the maximum sentence. The record of the guilty plea clearly shows that the trial court was not acting in an arbitrary or capricious manner; in fact, the court was merely honoring the plea bargain agreement entered into by the district attorney and Garlotte. Extenuating circumstances obviously existed when Garlotte's attorney attempted to plea bargain as to his sentence--he was also plea bargaining and being sentenced on two murder charges contemporaneously with this marijuana possession charge.

Since the sentence was within the bounds of Mississippi law and the trial judge was not acting in an arbitrary or capricious manner in imposing the maximum jail sentence, Garlotte is not entitled to any habeas relief based on his sentence.

As his last ground for relief, Garlotte alleges that he was denied full and fair consideration of his *pro se* pleadings by the Mississippi courts. It is clear that to maintain a petition for habeas corpus, the petitioner must be deprived of some right secured to him by the Constitution or the laws of the United States. Irving v. Thigpen, 732 F.2d 1215, 1216 (5th Cir. 1983) (citing 28 U.S.C. §2254(a) (1982); Baker v. McCollan, 443 U.S. 137

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(1979); Trussell v. Estelle, 699 F.2d 256, 259 (5th Cir. 1983)). We are of the opinion that this ground does not present a constitutional issue and, thus, is frivolous for the purposes of habeas relief.

Due to all of the above reasons, it is our opinion that Garlotte is not entitled to relief from this court. We recommend that his petition for writ of habeas corpus be denied.

Parties are hereby notified that failure to file written objections to the findings and recommendations contained in this report within ten days from the date of its filing shall bar an aggrieved party from attacking the factual findings on appeal.

This the 13th day of February, 1992.

s/ Alfred G. Nicols, Jr.
UNITED STATES MAGISTRATE JUDGE

AO 72A
(Rev. 8/82)

SOUTHERN DISTRICT OF M.
FILED
JUN 04 199
J. T. NOBLIN, CLERK
BY

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
HATTIESBURG DIVISION

HARVEY F. GARLOTTE

PETITIONER

VERSUS

CIVIL ACTION NO. H89-0187(P)(N)

RAY MABUS, ET AL

RESPONDENTS

ORDER

This cause came on this date to be heard upon the Report and Recommendation of the United States Magistrate Judge, after referral of hearing by this Court, and the Court, having fully reviewed the Report and Recommendation of the United States Magistrate Judge entered in this cause on or about February 13, 1992, the objections filed by Petitioner, the Response filed by Respondents, and being otherwise fully advised in the premises, finds that said Report and Recommendation should be adopted as the opinion of this Court.

IT IS, THEREFORE, ORDERED that the Report and Recommendation of United States Magistrate Judge Alfred G. Nicols, Jr. entered on or about February 13, 1992, be, and the same is hereby adopted as the finding of this Court, and the petition for writ of habeas corpus is hereby dismissed.

A separate judgment will be entered herein in accordance with this Order as required by Rule 58, Fed.R.Civ.P.

SO ORDERED AND ADJUDGED this the 3rd day of ~~MAY~~ June, 1992.

CHARLES W. PICKERING, SR.
UNITED STATES DISTRICT JUDGE

SOUTHERN DISTRICT OF MISSISSI
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J. T. NOBLIN, CLERK
BY _____ DEPU

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
HATTIESBURG DIVISION

HARVEY F. GARLOTTE — PETITIONER

VERSUS — CIVIL ACTION NO. H89-0187(P)(N)

RAY MABUS, ET AL — RESPONDENTS

JUDGMENT

This matter having come on to be heard on this date upon the Report and Recommendation of the United States Magistrate Judge entered in this cause on or about February 13, 1992, and the Court, after a full review of the record, having adopted said Report and Recommendation as the finding of the Court by Order dated ~~May~~ June 3rd, 1992, finds that this matter should be dismissed.

IT IS THEREFORE, ORDERED AND ADJUDGED that this cause be, and the same is hereby dismissed with prejudice.

SO ORDERED AND ADJUDGED this the 3rd day of ~~MAY~~ June, 1992.

CHARLES W. PICKERING, SR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
HATTIESBURG DIVISION

HARVEY F. GARLOTTE, PETITIONER

VERSUS CIVIL ACTION NO. H89-0187(P)

RAY MABUS, GOVERNOR, et al, RESPONDENT

BRIEF ON REMAND

COMES NOW the respondent in the above styled and numbered cause and files this brief on the question of whether or not petitioner has exhausted his state court remedies.

After further review of the prior filings of petitioner before the Mississippi Supreme Court respondent has discovered that petitioner did if fact raise the grounds found in Ground IV (Petitioner was subjected to double jeopardy) and Ground V (Petitioner's sentence was unusual and disproportionate). The reason for the failure of the state to discover these two grounds is that they were not included in the application to the Mississippi Supreme Court, but in the proposed filing before the circuit court. This proposed filing was attached as the ninth exhibit and appeared, without careful reading, to be part of the prior pleadings filed in another case.

Present counsel apologizes for this oversight and would not submit that petitioner seems to have exhausted his state court remedies.

Rec'd 8-4-91

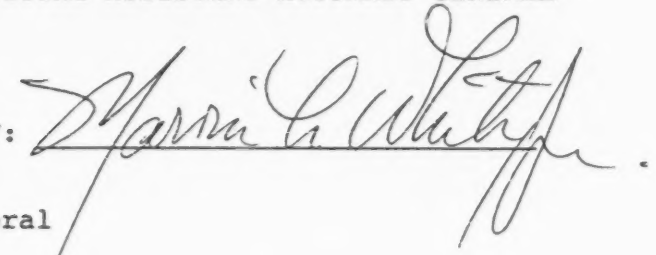
Wherefore, PREMISES CONSIDERED, respondents respectfully move this Court allow it twenty days from the entry of an appropriate order to file its answer to this petition for writ of habeas corpus.

Respectfully submitted,

MIKE MOORE
ATTORNEY GENERAL
STATE OF MISSISSIPPI

MARVIN L. WHITE, JR.
ASSISTANT ATTORNEY GENERAL
(Counsel of Record)

CHARLENE R. PIERCE
SPECIAL ASSISTANT ATTORNEY GENERAL

BY: 

Office of the Attorney General
Post Office Box 220
Jackson, Mississippi 39205
Telephone: (601) 359-3813

CERTIFICATE

I, Marvin L. White, Jr., Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day caused to be mail, first-class postage prepaid, a true and correct copy of the foregoing **ANSWER AND RETURN TO PETITION FOR WRIT OF HABEAS CORPUS** to the following:

Harvey F. Garlotte, Pro Se
MSP# 60710, Unit 30-D
Parchman, Mississippi 38738

This the 29th day of July, 1991.

MARVIN L. WHITE, JR.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
HATTIESBURG DIVISION

HARVEY F. GARLOTTE — PETITIONER

VERSUS — CIVIL ACTION NO. H89-0187(P)

RAY MABUS, ET AL. — RESPONDENTS

RESPONDENT'S CLARIFICATION
OF EXHAUSTION ISSUE IN REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

COMES NOW respondent and files this clarification of its position on the exhaustion issue included in the above styled and numbered cause.

In his Report and Recommendation in this case the Magistrate Judge made the following statement:

> Although it is unclear whether or not Garlotte has exhausted his state court remedies on all of his alleged grounds for relief, it appears that a return to the state court may prove futile. Thus, it is our recommendation that the exhaustion requirement be waived and that Garlotte's petition be considered on the merits. [Emphasis added.]

R. & R. at 2.

This confusion arises from our Brief on Remand filed on July 29, 1991, after this case was remanded to the Magistrate Judge by the District Court for reconsideration. In earlier responses we claimed that Grounds IV and V were not exhausted. On review of the filings by new counsel we discovered that these claims had in fact been exhausted by petitioner. We stated in that document:

> Present counsel apologizes for this oversight and would not submit that

petitioner seems to have exhausted his state court remedies. [Emphasis added.]

Brief on Remand at 1.

The word not was a typographical error and the phrase should read "and would now submit that petitioner seems to have exhausted his state court remedies." This was intended as a submission that the state was waiving the exhaustion issue.

As is clear from the rulings of the United States Supreme Court in Castille v. Peoples, 489 U.S. 346, 109 S.Ct. 1056, 103 L.Ed.2d 379 (1989) and Rose v. Lundy, 455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982) the issue of exhaustion is waivable by the state. However, if the State refuses to waive the issue then the habeas petition must be dismissed as a mixed petition and the petitioner allowed to repair to the state courts to exhaust the unexhausted claims. This is a decision that is the State's to make and not one for the federal courts unless it appears that such would be futile. Of course, a claim can be considered exhausted because it is clearly barred from consideration under state law. It would be futile to return to state court because the state courts would refuse to consider it because it is procedurally barred. This claim is then considered exhausted and the claim must be treated as a claim barred from consideration by the federal courts. Castille v. Peoples, 103 L.Ed.2d at 387.

So that there is no confusion in this case that may come back to haunt the resolution of this petition, the State would

submit that petitioner has exhausted the claims that he now raises.

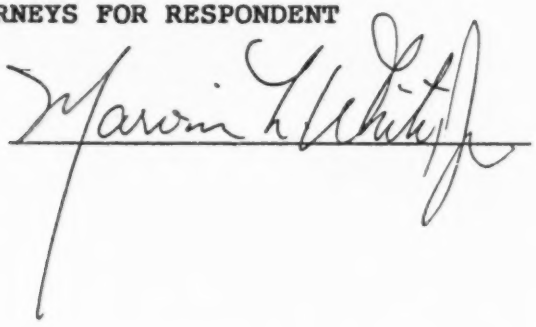
We file this brief not as an objection to the Report and Recommendation of the Magistrate Judge, but to clarify the State's position on the issue of exhaustion of petitioner's state court remedies.

Respectfully submitted,

MIKE MOORE
ATTORNEY GENERAL
STATE OF MISSISSIPPI

MARVIN L. WHITE, JR.
ASSISTANT ATTORNEY GENERAL
(Counsel of Record)

ATTORNEYS FOR RESPONDENT

BY: 

Office of the Attorney General
Post Office Box 220
Jackson, Mississippi 39205
Telephone: (601) 359-3680

CERTIFICATE

I, Marvin L. White, Jr., Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day caused to be mailed, via United States Postal Service, first-class postage prepaid, a true and correct copy of the foregoing **RESPONDENT'S CLARIFICATION OF EXHAUSTION ISSUE IN REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE** to the following:

Harvey F. Garlotte, Pro Se
MSP # 60710, Unit 30-D
Mississippi State Penitentiary
Parchman, Mississippi 38738

This the 19th day of February, 1992.

MARVIN L. WHITE, JR.

U.S. COURT OF APP
FILED
MAR 3 1994
CHARLES R. FULBRUGE
CLEI

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-7396

HARVEY F. GARLOTTE,

Petitioner-Appellant,

versus

KIRK FORDICE, Governor,

Defendant-Appellee.

- - - - - - - - - - -

Appeal from the United States District Court
for the Southern District of Mississippi
USDC No. CA-H89-0187(P)(N)

- - - - - - - - - - -

O R D E R:

Harvey F. Garlotte moves this Court for a certificate of probable cause (CPC). Garlotte argues that the district court prematurely dismissed his petition without requiring the respondent to file an answer and without conducting an evidentiary hearing.

Rule 4 of the Rules Governing Section 2254 Cases permits the district court to dismiss the petition without requiring the state to respond only if the claims are frivolous, or it appears from the face of the petition that the petitioner is not entitled to relief. McNeil v. Blackburn, 802 F.2d 830, 833 (5th Cir. 1986). In his petition Garlotte alleged, inter alia, that his guilty plea was involuntary and that he was denied effective assistance of counsel. If Garlotte is able to prove these allegations he may be entitled to habeas relief. See McNeil, 802 F.2d at 832-33 (when a defendant pleads guilty on the basis of a

promise by defense counsel or the prosecutor, breach of the promise, even if the promise is unfulfillable, taints the voluntariness of the plea). The district court did not advert to these specific allegations.

Therefore, IT IS ORDERED that Garlotte's motion for CPC is GRANTED. IT IS FURTHER ORDERED that the respondent brief the issue whether the district court prematurely dismissed the petition without requiring an answer and without conducting an evidentiary hearing. See McNeil, 802 F.2d at 933; Tijerina v. Estelle, 692 F.2d 3, 5-6 (5th Cir. 1992) (an evidentiary hearing is required only if factual disputes cannot be resolved on the record).

John M. Duhé Jr.

JOHN M. DUHÉ, JR.
UNITED STATES CIRCUIT JUDGE

AMENDMENT 14

Section 1. Citizens of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Sec. 2. Representatives—Power to reduce apportionment.

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Sec. 3. Disqualification to hold office.

No person shall be a Senator or Representative in Congress, or Elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Sec. 4. Public debt not to be questioned—Debts of the Confederacy and claims not to be paid.

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or

obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slaves; but all such debts, obligations, and claims shall be held illegal and void.

Sec. 5. Power to enforce amendment.

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Amendments:

1966. Act Nov. 2, 1966, P. L. 89-711, § 3, 80 Stat. 1106, amended the analysis of this chapter by substituting "Federal" for "State" in item 2254.

1978. Act Nov. 6, 1978, P. L. 95-598, Title II, § 250(b), 92 Stat. 2672 (effective April 1, 1984, as provided by § 402(b) of such Act) amended the analysis of this chapter by adding "2256. Habeas corpus from bankruptcy courts"; however, such amendment did not become effective pursuant to the amendment of such § 402(b) by § 113 of Act July 10, 1984, P. L. 98-353, Title I, 98 Stat. 343.

RESEARCH GUIDE

Federal Procedure L Ed:

2 Fed Proc L Ed, Administrative Procedure § 2:239.

12 Fed Proc L Ed, Evidence § 33:11.

16 Fed Proc L Ed, Habeas Corpus § 41:548.

18A Fed Proc L Ed, Immigration, Naturalization and Nationality § 45:1489.

33 Fed Proc L Ed, Trial § 77:23.

Am Jur:

3A Am Jur 2d, Aliens and Citizens § 2052.

32B Am Jur 2d, Federal Practice and Procedure § 253.

32B Am Jur 2d, Federal Rules of Evidence § 10.

39 Am Jur 2d, Habeas Corpus § 155.

Forms:

2 Fed Procedural Forms L Ed, Appeal, Certiorari, and Review § 3:411.

3 Fed Procedural Forms L Ed, Armed Forces, Civil Disturbances, and National Defense § 5:531.

6A Fed Procedural Forms L Ed, Contempt § 16:91.

10A Fed Procedural Forms L Ed, Immigration, Naturalization, and Nationality § 40:251.

Bankruptcy Service L Ed:

2 Bkr L Ed, Code Commentary and Analysis § 11:117.

Immigration Law Service:

2 Immigration Law Service, Basic Rules § 14:27.

2A Immigration Law Service, Actions by and Against Aliens § 27:32.

Auto-Cite®: Cases and annotations referred to herein can be further researched through the Auto-Cite® computer-assisted research service. Use Auto-Cite to check citations for form, parallel references, prior and later history, and annotation references.

§ 2241. Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless—

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

(June 25, 1948, ch 646, § 1, 62 Stat. 964; May 24, 1949, ch 139, § 112, 63 Stat. 105; Sept. 19, 1966, P. L. 89-590, 80 Stat. 811.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Prior law and revision:

This section is based on R. S. §§ 751, 752, 753; Act March 3, 1911, ch 231, § 291, 36 Stat. 1167; Feb. 13, 1925, ch 229, § 6, 43 Stat. 940; June 29, 1938, ch 806, 52 Stat. 1232 (§§ 451, 452, and 453 of former Title 28).

Section consolidates sections cited with changes in phraseology necessary to effect the consolidation. Words "for the purpose of an inquiry into the cause of restraint of liberty" in former 28 USCS § 452 were omitted as merely descriptive of the writ. Subsection (b) was added to give statutory sanction to orderly and appropriate procedure. A circuit judge who unnecessarily entertains applications which should be addressed to the district court, thereby disqualifies himself to hear such matters on appeal and to that extent limits his usefulness as a judge of the court of appeals. The Supreme Court and Supreme Court Justices shall not be burdened with applications for writs cognizable in the district courts.

could not review decision of board that registrant was not entitled to exemption as a minister of religion, where record did not disclose such facts as were within knowledge of board. Harris v Ross (1944, CA5 Ga) 146 F2d 355.

Although at hearing upon writ of habeas corpus it appeared that since commencement war theological seminary had had suspicious increase in its membership, that fact was not before draft board in particular case, and Court of Appeals could not consider it in deciding whether there was substantial evidence to support the denial of claimed theological student exemption. United States ex rel. Levy v Cain (1945, CA2 NY) 149 F2d 338.

IV. DISPOSITION OF APPEAL

35. Generally

In light of petitioner's history of filing numerous, legally frivolous petitions, he would be barred from filing any new petition seeking extraordinary writs. Demos v United States Dist. Court (1991, CA9) 925 F2d 1160, 91 CDOS 1067, 91 Daily Journal DAR 1645, cert den (1991, US) 112 L Ed 2d 1186, 111 S Ct 1082, later proceeding (1992, CA9 Wash) 1992 US App LEXIS 10303.

36. Removal of appeal from docket

Where petitioner voluntarily absented himself from country, appeal removed from docket without prejudice to right to have appeal reinstated on appropriate motion if within prescribed time (30 days), petitioner became available and subject to judgment of court. United States ex rel. Bottoms v Eberhardt (1972, CA5 Ga) 467 F2d 578.

Where petitioner became a fugitive, appeal removed from docket without prejudice to reinstatement upon appropriate motion if petitioner became available to court and subject to judgment within prescribed time (30 days); if time elapses without necessary appearance, appeal will be dismissed. Van Blaricom v Forscht (1974, CA5 Fla) 490 F2d 461, on reh (1975, CA5 Fla) 511 F2d 615, cert den (1975) 423 US 915, 46 L Ed 2d 144, 96 S Ct 222.

37. Withdrawal of appeal

Mental patient who was conditionally released from custody may withdraw his appeal from denial of writ of habeas corpus, although court will not stay proceedings and retain jurisdiction notwithstanding contention that hospital retained power to return petitioner to maximum security without even minimal due process hearing. Jackson v Robinson (1973) 155 App DC 94, 476 F2d 539.

38. Remand of proceedings

Where in habeas corpus proceeding it was not established whether or not inductee who had claimed classification as conscientious objector objected to participation in any war under any circumstances because of compelling voice of his conscience, Court of Appeals in reviewing order of district court dismissing petition and writ would not order inductee discharged but would remand him to district court for ascertainment as to whether or not director of selective service had adopted the finding of hearing officer to effect that inductee did not have conscientious objections to war under any circumstances. United States ex rel. Reel v Badt (1944, CA2 NY) 141 F2d 845.

Absent a ruling by district judge on application for certificate of probable cause, case remanded to secure same in interest of petitioner's right to a first level decision. Stewart v Beto (1971, CA5 Tex) 454 F2d 268.

Where petitioners pro se habeas corpus petition, though rather incoherent, indicated he might be entitled to relief, justice requires cause be remanded to District Court with instructions to permit petitioner leave to amend petition with aid of appointed counsel. Fryer v MacDougall (1972, CA5 Ga) 462 F2d 1093.

§ 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has

the right under the law of the State to raise, by any available procedure, the question presented.

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support

such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(June 25, 1948, ch 646, § 1, 62 Stat. 967; Nov. 2, 1966, P. L. 89-711, § 2, 80 Stat. 1105.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Prior law and revision:

This section is declaratory of existing law as affirmed by the Supreme Court. (See Ex parte Hawk (1944) 321 US 114, 88 L Ed 572, 64 S Ct 448.) This section was enacted as amended by the Senate with the following explanation:

"This amendment is proposed by the Judicial Conference of Senior Circuit Judges.

"It has three purposes. The first is to eliminate from the prohibition of the section applications in behalf of prisoners in custody under authority of a State officer but whose custody has not been directed by the judgment of a State court. If the section were applied to applications by persons detained solely under authority of a State officer it would unduly hamper Federal courts in the protection of Federal officers prosecuted for acts committed in the course of official duty.

"The second purpose is to eliminate, as a ground of Federal jurisdiction to review by habeas corpus judgments of State courts, the proposition that the State court has denied a prisoner a 'fair adjudication of the legality of his detention under the Constitution and laws of the United States.' The Judicial Conference believes that this would be an undesirable ground for Federal jurisdiction in addition to exhaustion of State remedies or lack of adequate remedy in the State courts because it would permit proceedings in the Federal court on this ground before the petitioner had exhausted his State remedies. This ground would, of course, always be open to a petitioner to assert in the Federal court after he had exhausted his State remedies or if he had no adequate State remedy.

"The third purpose is to substitute detailed and specific language for the phrase 'no adequate remedy available.' That phrase is not sufficiently specific and precise, and its meaning should, therefore be spelled out in more detail in the section as is done by the amendment."

Amendments:

1966. Act Nov. 2, 1966, in the section heading, substituted "Federal" for "State"; added subsec. (a); designated existing matter as subsecs. (b) and (c); and added subsecs. (d)–(f).

...ange, 1986, ch. 413, § 64, eff from and after passage (approved March 28, 1986).

Editor's Note—

This section was reenacted without change by Laws, 1986, ch. 413, § 64, effective from and after passage (approved March 28, 1986). Since the text of the section as it appears in the parent volume is unaffected by the reenactment, it is not reprinted in the supplement as directed by § 144 of ch. 413, Laws, 1986.

Section 118 of Chapter 465, Laws of 1981, which provided for an automatic repeal of provisions reenacting the Department of Corrections and the State Parole Board on June 30, 1984, was repealed by Section 126, Chapter 471, Laws of 1984. In turn, Section 128, Chapter 471, Laws of 1984, provides for an automatic repeal of this section from and after July 1, 1986. Subsequently, Laws of 1986, ch. 413, § 126, effective from and after passage (approved March 28, 1986) repealed § 128 of ch. 471, Laws of 1984, thereby removing the repeal date.

JUDICIAL DECISIONS

A judge's use of county prisoners to carry out personal labors on his own behalf justified removal of the judge from office. In Re Collins (1987, Miss) 524 So 2d 553.

§ 47-5-138. Earned time allowances; promulgations of rules and regulations; forfeiture generally; release of offender.

(1) The State Board of Corrections shall formulate and promulgate rules and regulations providing for earned time allowances to be awarded to offenders based upon the performance of the offenders and for meritorious earned time allowances to be awarded pursuant to the provisions of Section 47-5-142. Except that earned time allowances and/or meritorious earned time allowances shall not be awarded to offenders sentenced to life imprisonment. Such rules and regulations shall not provide for earned time allowances and/or meritorious earned time allowances exceeding one-half (½) of the period of confinement imposed by the court. Such rules and regulations shall differentiate between habitual offenders for the purposes of awarding earned time or meritorious earned time. "Habitual offender" shall be defined as a person convicted in this state of a felony who shall have been convicted twice previously of any felony or federal crime upon charges separately brought and arising out of separate incidents at different times

(CONTINUED ON NEXT PAGE)

and who shall have been sentenced to separate terms of one (1) year or more in any state and/or federal penal institution, whether in this state or elsewhere.

(2) The wardens of the various correctional facilities within the state shall immediately notify the State Department of Corrections in writing of any punishment imposed or other disciplinary action taken against any offender under such warden's custody, said report to be on forms prescribed and furnished by the State Department of Corrections, and shall show, among other things, the detail assignment and behavior record of the offender. From said record so furnished, the Commissioner of Corrections or his designee may suspend the offender from receiving earned time or meritorious earned time for a specified period, and may forfeit up to one-half (½) the earned time allowances or meritorious earned time allowances where the disciplinary action involves a serious violation of prison rules and regulations or forfeit all or any part of earned time allowances or meritorious earned time allowances where the violation is a crime punishable by law and the forfeiture is in lieu of prosecution.

(3) An offender shall be released at the expiration of his term of sentence, less the time earned as earned time allowances and meritorious earned time allowances.

SOURCES: Reenacted and amended, Laws, 1984, ch. 386; reenacted, 1984, ch. 471, § 65; 1985, ch. 531, § 2; reenacted, 1986, ch. 413, § 65, eff from and after passage (approved March 28, 1986).

Editor's Note—

Section 118 of Chapter 465, Laws of 1981, which provided for an automatic repeal of provisions reenacting the Department of Corrections and the State Parole Board on June 30, 1984, was repealed by Section 126, Chapter 471, Laws of 1984. In turn, Section 128, Chapter 471, Laws of 1984, provides for an automatic repeal of this section from and after July 1, 1986. Subsequently, Laws of 1986, ch. 413, § 126, effective from and after passage (approved March 28, 1986) repealed § 128 of ch. 471, Laws of 1984, thereby removing the repeal date.

Cross references—

Meritorious earned time, see § 47-5-142.

Eligibility for earned time credit for inmates participating in joint state-county public service work programs, see § 47-5-413.

Provision for notice to the sheriff of the county in which an offender was convicted prior to release of the offender from the custody of the Department of Corrections, see § 47-5-177.

Earned time credit for inmates participating in joint state-county work program, see § 47-5-461.

Participation in a drug identification program by a person on probation or parole, see §§ 47-5-501 et seq.

Provisions relative to prison system overcrowding and the exercise of powers which tend to reduce prison system population or expand operating capacity during states of emergency, see §§ 47-5-701 et seq.

Utilization of powers which tend to reduce prison system population, including earned time allowances, prior to declaration of a prison system overcrowding state of emergency, see § 47-5-705.

Procedures for revocation of conditional advancement of parole eligibility date during period of prison overcrowding, see § 47-5-723.

Relationship between earned time allowances and advancement of parole eligibility dates during periods of prison overcrowding, see § 47-5-727.

JUDICIAL DECISIONS

Defendant sentenced as habitual offender has no entitlement to credit for "good time." Hardy v State (1985, Miss) 473 So 2d 941.

The actions of corrections officials in designating a prisoner eligible for earned time, due to an administrative or clerical error, and then in withdrawing that designation, did not amount to a forfeiture of earned time without

from his parole eligibility date since he did not become eligible for earned time until after the Attorney General issued an opinion discontinuing the practice of allowing earned time to shorten parole eligibility. McFadden v State (1988, Miss) 523 So 2d 77.

certain privileges available to other prisoners. Perkins v Cabana (1986, CA5 Miss) 794 F2d 168, cert den (US) 93 L Ed 2d 366, 107 S Ct 414.

§ 47-5-139. Earned time for good conduct and performance; forfeiture of earned time in event of escape.

(1) In order to encourage discipline, a distinction shall be made in the treatment of offenders so as to extend to all such as are orderly, industrious and obedient the comforts and privileges according to their deserts. The reward to be bestowed on prisoners for good conduct and performance shall consist of such relaxation of strict prison rules and extension of social privileges as may be consistent with proper discipline and security.

(2) The classification committee shall group all inmates into one (1) of four (4) separate and distinct classes with earned time to be earned as follows:

(a) Offenders in Class I shall be allowed to earn up to thirty (30) days reduction for each month served.

(b) Offenders in Class II shall be allowed to earn up to twenty (20) days reduction for each month served.

(c) Offenders in Class III shall be allowed to earn up to eight (8) days reduction for each month served.

(d) Offenders in Class IV shall not be allowed to earn any earned time.

Provided further, an inmate shall be placed in Class IV when received at the correctional system and shall remain in such class for at least thirty (30) calendar days. Any subsequent promotion, whether original or after having been demoted, shall be made only to the next highest class in which the inmate must remain for a reasonable time to evaluate performance before being again promoted.

Offenders may be reclassified as often as the committee deems necessary to carry out the purposes of this section and to maintain good discipline and efficiency at the institution.

Provided, however, any change in classification of an offender shall be subject to the approval of the commissioner.

(3) An offender under two (2) or more consecutive sentences shall be allowed commutation based upon the total term of the sentences. Provided, that under consecutive life sentences, the commutation shall be based on the aggregate total arrived at by multiplying the number of such sentences by ten (10) years.

(4) No inmate shall earn any earned time while assigned to the maximum security facilities for disciplinary purposes.

(5) All earned time shall be forfeited by the inmate in the event of escape and/or aiding and abetting an escape. Provided, in the event of escape, the commissioner may restore all or part of any accrued earned time if the escapee returns to the institution voluntarily, without expense to the state, and without act of violence while a fugitive from the facility.

(6) Only Class I offenders shall be eligible for parole.

(7) No inmate in any event shall have his sentence terminated by administrative earned time action until he is eligible for parole as provided in Title 47, Chapter 7, Mississippi Code of 1972.

(8) Any officer or employee who shall willfully violate the provisions of this section and be convicted therefor shall be removed from office or employment.

SOURCES: Laws, 1982, ch. 431, § 2; reenacted, 1984, ch. 471, § 66; reenacted, 1986, ch. 413, § 66, eff from and after passage (approved March 28, 1986).

Editor's Note—

Section 118 of Chapter 465, Laws of 1981, which provided for an automatic repeal of provisions reenacting the Department of Corrections and the State Parole Board on June 30, 1984, was repealed by Section 126, Chapter 471, Laws of 1984. In turn, Section 128, Chapter 471, Laws of 1984, provides for an automatic repeal of this section from and after July 1, 1986. Subsequently, Laws of 1986, ch. 413, § 126, effective from and after passage (approved March 28, 1986) repealed § 128 of ch. 471, Laws of 1984, thereby removing the repeal date.

Cross references—

Penalty of life imprisonment without parole for sale of specified quantities of certain drugs, see § 41-29-139.

Meritorious earned time, see § 47-5-142.

Eligibility for earned time credit for inmates participating in joint state-county public service work programs, see § 47-5-413.

Earned time credit for inmates participating in joint state-county work program, see § 47-5-461.

Utilization of powers which tend to reduce prison system population, including earned time allowances, prior to declaration of a prison system overcrowding state of emergency, see § 47-5-705.

Procedures for revocation of conditional advancement of parole eligibility date during period of prison overcrowding, see § 47-5-723.

Relationship between earned time allowances and advancement of parole eligibility dates during periods of prison overcrowding, see § 47-5-727.

JUDICIAL DECISIONS

Under the requirement of § 47-7-3 that a person under a life sentence becomes eligible for parole after ten years, a prisoner serving three consecutive life terms would not be eligible for parole until he had served at least ten years of each life sentence less 30 percent of earned good time, since § 47-5-139(3) mandates the mathematical process of multiplying the number of life sentences imposed upon the prisoner by ten years to determine the date upon which the prisoner would become eligible for parole. Davis v State (1983, Miss) 429 So 2d 262.

A defendant convicted of armed robbery was not eligible to reduce his sentence with the grant of administrative good time, pursuant to § 47-5-139, since earned time for good conduct and performance only applies to inmates who are eligible for parole, and defendant was not entitled to parole under § 47-7-

ment of Corrections administratively barring him from earning good time after January, 1981, although good time earned prior to that date was not taken away, notwithstanding the provisions of § 47-5-139(7), since the statutory provisions regarding good time remained unchanged, and since administrative interpretation of a clearly worded statute is not a "law" within the scope and contemplation of the ex post facto clauses of the federal and state Constitutions. Tiller v State (1983, Miss) 440 So 2d 1001.

Denial of credit for time served in jail and of "good time" to person convicted of felony who appeals judgment of conviction and who remains in jail pending disposition of appeal due to inability to make bond, while allowing credit for time served in jail and award of "good time" to convicted felons serving sen-

tence in county jail without appealing convic-

SOURCES: Reenacted without change, Laws, 1984, ch. 471, § 67; reenacted without change, 1986, ch. 413, § 67, eff from and after passage (approved march 28, 1986).

Editor's Note—

This section was reenacted without change by Laws, 1986, ch. 413, § 67, effective from and after passage (approved March 28, 1986). Since the text of the section as it appears in the parent volume is unaffected by the reenactment, it is not reprinted in the supplement as directed by § 144 of ch. 413, Laws, 1986.

Section 118 of Chapter 465, Laws of 1981, which provided for an automatic repeal of provisions reenacting the Department of Corrections and the State Parole Board on June 30, 1984, was repealed by Section 126, Chapter 471, Laws of 1984. In turn, Section 128, Chapter 471, Laws of 1984, provides for an automatic repeal of this section from and after July 1, 1986. Subsequently, Laws of 1986, ch. 413, § 126, effective from and after passage (approved March 28, 1986) repealed § 128 of ch. 471, Laws of 1984, thereby removing the repeal date.

§ 47-5-141. [En Laws, 1982, ch. 431, § 3] Repealed by Laws, 1983, ch. 391, § 2, eff from and after March 24, 1983.

Editor's note—

This section provided for voluntary donations of blood.

§ 47-5-142. Meritorious earned time.

(1) In order to provide incentive for offenders to achieve positive and worthwhile accomplishments for their personal benefit or the benefit of others, and in addition to any other administrative reductions of the length of an offender's sentence, any offender shall be eligible, subject to the provisions of this section, to accrue meritorious earned time as distinguished from earned time for good conduct and performance.

(2) Subject to approval by the commissioner of the terms and conditions of the program or project, meritorious earned time may be awarded for the following: (a) successful completion of educational or instructional programs; (b) satisfactory participation in work projects; and (c) satisfactory participation in any special incentive program.

(3) The programs and activities through which meritorious earned time may be accrued shall be published in writing and posted in conspicuous places at all facilities of the department and such publication shall be made available to all offenders in the custody of the department.

(4) The commissioner shall make a determination of the number of days reduction of sentence which may be earned as meritorious earned time for participation in approved programs or projects, and such number shall be determined by the commissioner on the basis of each particular program or project. However, in no event shall an offender be allowed to earn in excess of ten (10) days reduction for each thirty (30) days of participation in such a

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program or project. Furthermore, an offender shall never be allowed to earn more than a total of one hundred eighty (180) days of meritorious earned time during the entire time he is under the jurisdiction of the Department of Corrections.

(5) No offender shall earn any meritorious earned time while assigned to the maximum security facilities for disciplinary purposes.

(6) All meritorious earned time shall be forfeited by the offender in the event of escape and/or aiding and abetting an escape. Provided, in the event of escape, the commissioner may restore all or part of any accrued meritorious earned time if the escapee returns to the institution voluntarily, without expense to the state, and without act of violence while a fugitive from the facility.

(7) Any officer or employee of the department who shall willfully violate the provisions of this section and be convicted therefor shall be removed from office or employment.

SOURCES: Laws, 1985, ch. 531, § 1, eff from and after July 1, 1985.

Cross references—

Earned time, generally, see §§ 47-5-138, 47-5-139.

Earned time credit for inmates participating in joint state-county public service work programs, see §§ 47-5-413.

Prison Overcrowding Emergency Powers Act, see §§ 47-5-701 et seq.

Effect of meritorious earned time upon parole eligibility, see § 47-7-3.

Penalties for state and county prisoners who escape from custody, see §§ 97-9-43 et seq.

Research and Practice References—

60 Am Jur 2d, Penal and Correctional Institutions §§ 58-64.

72 CJS, Prisons § 21.

22 Am Jur Trials, Prisoners' Rights Litigation §§ 1 et seq.

ALR and L Ed Annotations—

Withdrawal, forfeiture, modification, or denial of good-time allowance to prisoner. 95 ALR2d 1265.

Denial of state prisoner's application for, or revocation of, participation in work or study release program or furlough program as actionable under Civil Rights Act of 1871 (42 USCS

CHAPTER NO. 520
SENATE BILL NUMBER 2030

AN ACT TO AMEND SECTION 47-5-138, MISSISSIPPI CODE OF 1972, TO REVISE EARNED TIME ALLOWANCE FOR INMATES; TO AUTHORIZE THE DEPARTMENT OF CORRECTIONS TO PREPARE A CONDITIONAL EARNED TIME RELEASE DATE FOR ALL INMATES; TO PROVIDE FOR THE FORFEITURE OF EARNED TIME ALLOWANCES IF VIOLATION IS FELONIOUS IN NATURE; TO DELETE PROVISIONS PERTAINING TO HABITUAL OFFENDERS AND OFFENDERS SENTENCED TO LIFE IMPRISONMENT; TO AMEND SECTION 47-5-139, MISSISSIPPI CODE OF 1972, TO PROVIDE THAT INMATES SENTENCED AS HABITUAL OFFENDERS, SENTENCED TO LIFE IMPRISONMENT, SENTENCED FOR ARMED ROBBERY AND SEX OFFENDERS DENIED PAROLE SHALL NOT BE ELIGIBLE FOR EARNED TIME ALLOWANCE; TO AMEND SECTION 47-5-140, MISSISSIPPI CODE OF 1972 TO CONFORM; TO AMEND SECTION 47-5-142, MISSISSIPPI CODE OF 1972, TO REVISE MERITORIOUS EARNED-TIME ALLOWANCES; AND FOR RELATED PURPOSES.

Be it enacted by the Legislature of the State of Mississippi:

SECTION 1. Section 47-5-138, Mississippi Code of 1972, is amended as follows:

47-5-138. (1) The department may promulgate rules and regulations to carry out the earned time allowances program. An inmate shall be eligible to receive an earned time allowance of one-half (1/2) of the period of confinement imposed by the court except those inmates excluded by law. The department shall determine a conditional earned time release date by subtracting the earned time allowance from an inmate's term of sentence and shall prepare a conditional earned time release date for each inmate.

(2) If an inmate commits a violation felonious in nature, he may forfeit all or part of the earned time allowance upon the written order of the commissioner. The superintendent of a correctional facility shall immediately notify the commissioner in writing of any such violation on such forms and in such detail as the commissioner may require. From the record so furnished, the Commissioner of Corrections may order the forfeiture of all or part of the earned time allowance of an inmate who commits a violation felonious in nature. The order of the commissioner shall be in writing and the conditional earned time release date shall be modified accordingly.

(3) An offender, demonstrating acceptable behavior, shall be released on his conditional earned time release date.

SECTION 2. Section 47-5-139, Mississippi Code of 1972, is amended as follows:

47-5-139. (1) An inmate shall not be eligible for the earned time allowance if:

(a) The inmate was sentenced to life imprisonment;

(b) The inmate was convicted as a habitual offender under Sections 99-19-81 through 99-19-87;

(c) The inmate has forfeited his earned time allowance by order of the commissioner;

(d) The inmate was convicted of a sex crime and has been denied parole based on the psychiatric or psychological examination required by law; or

(e) The inmate has not served the mandatory time required for parole eligibility for a conviction of robbery or attempted robbery with a deadly weapon.

Defendant sentenced a habitual offender has no entitlement to credit for "good time." Hardy v State (1985, Miss) 473 So 2d 941.

Reasonable and harmonious construction of §§ 47-5-138, 47-5-139, and 47-7-3 is that legislature intended them to maintain enhanced penalty that § 99-19-81 imposes on habitual offenders, which penalty includes denial of certain privileges available to other prisoners. Perkins v Cabana (1986, CA5 Miss) 794 F2d 168, cert den 479 US 936, 93 L Ed 2d 366, 107 S Ct 414.

§ 47–5–139. Certain inmates ineligible for earned time allowance; commutation to be based on total term of sentences; forfeiture of earned time in event of escape.

(1) An inmate shall not be eligible for the earned time allowance if:

(a) The inmate was sentenced to life imprisonment;

(b) The inmate was convicted as a habitual offender under Sections 99-19-81 through 99-19-87;

(c) The inmate has forfeited his earned time allowance by order of the commissioner;

(d) The inmate was convicted of a sex crime and has been denied parole based on the psychiatric or psychological examination required by law; or

(e) The inmate has not served the mandatory time required for parole eligibility for a conviction of robbery or attempted robbery with a deadly weapon.

(2) An offender under two (2) or more consecutive sentences shall be allowed commutation based upon the total term of the sentences.

(3) All earned time shall be forfeited by the inmate in the event of escape and/or aiding and abetting an escape. Provided, in the event of escape, the commissioner may restore all or part of the earned time if the escapee returns to the institution voluntarily, without expense to the state, and without act of violence while a fugitive from the facility.

(4) No inmate in any event shall have his sentence terminated by administrative earned time action until he is eligible for parole as provided in Title 47, Chapter 7, Mississippi Code of 1972.

(5) Any officer or employee who shall willfully violate the provisions of this section and be convicted therefor shall be removed from office or employment.

SOURCES: Codes, 1942, § 7944; Laws, 1964, ch. 378, § 24; 1971, ch. 524, § 12; 1973, ch. 357, § 1; 1974, ch. 539, § 29; 1975, ch. 485, §§ 2, 5; 1976, ch. 389; 1976, ch. 440, § 67; 1977, ch. 479, § 3; reenacted, 1981, ch. 465, § 74; 1981, ch. 502, § 10; 1982, ch. 431, § 2; reenacted, 1984, ch. 471, § 66; reenacted, 1986, ch. 413, § 66; 1992, ch. 520, § 2, eff from and after passage (approved May 14, 1992).

Cross references—

Penalty of life imprisonment without parole for sale of specified quantities of certain drugs, see § 41-29-139.

Classification committee, see §§ 47-5-99 et seq.

Proceedings before classification committee on demotion of offenders or forfeiture of earned time, see § 47-5-104.

Handbook explaining earned time procedure, see § 47-5-140.

Meritorious earned time, see § 47-5-142.

Eligibility for earned time credit for inmates participating in joint state-county public service work programs, see § 47-5-413.

Earned time credit for inmates participating in joint state-county work program, see § 47-5-

§ 47-5-142. Meritorious earned time.

(1) In order to provide incentive for offenders to achieve positive and worthwhile accomplishments for their personal benefit or the benefit of others, and in addition to any other administrative reductions of the length of an offender's sentence, any offender shall be eligible, subject to the provisions of this section, to receive meritorious earned time as distinguished from earned time for good conduct and performance.

(2) Subject to approval by the commissioner of the terms and conditions of the program or project, meritorious earned time may be awarded for the following: (a) successful completion of educational or instructional programs; (b) satisfactory participation in work projects; and (c) satisfactory participation in any special incentive program.

(3) The programs and activities through which meritorious earned time may be received shall be published in writing and posted in conspicuous places at all facilities of the department and such publication shall be made available to all offenders in the custody of the department.

(4) The commissioner shall make a determination of the number of days of reduction of sentence which may be awarded an offender as meritorious earned time for participation in approved programs or projects; the number of days shall be determined by the commissioner on the basis of each particular program or project. However, in no event shall an offender be awarded in excess of ten (10) days reduction for each thirty (30) days of participation in such a program or project. Furthermore, an offender shall never be allowed to earn more than a total of one hundred eighty (180) days of meritorious earned time during the entire time he is under the jurisdiction of the Department of Corrections. The commissioner may authorize the awarding of all or any part of meritorious earned time upon an offender's entry into the correctional system.

(5) No offender shall be awarded any meritorious earned time while assigned to the maximum security facilities for disciplinary purposes.

(6) All meritorious earned time shall be forfeited by the offender in the event of escape and/or aiding and abetting an escape.

(7) Any officer or employee of the department who shall willfully violate the provisions of this section and be convicted therefor shall be removed from office or employment.

(8) An offender may forfeit all or any part of his meritorious earned time allowance for just cause upon the written order of the commissioner or his designee. Any meritorious earned time allowance forfeited under this section shall not be restored nor shall it be re-earned by the offender.

SOURCES: Laws, 1985, ch. 531, § 1; 1992, ch. 520, § 4, eff from and after passage (approved May 14, 1992).

and personnel of the department of corrections utilized for adult offenders who are committed to the custody of the department.

(k) "Special meetings" shall mean those meetings called by the chairman with at least twenty-four (24) hours' notice or a unanimous waiver of notice.

SOURCES: Laws, 1976, ch. 440, § 3; reenacted, 1981, ch. 465, § 91; reenacted, 1984, ch. 471, § 101; reenacted, 1986, ch. 413, § 101, eff from and after passage (approved March 25, 1986).

Editor's Note—

Laws, 1976, ch. 465, § 118, provides as follows:

"SECTION 1. This act shall be known and may be cited as the "Mississippi Corrections Act of 1976.".

§ 47-7-3. Parole of prisoners; conditions; determination of tentative hearing date.

(1) Every prisoner who has been or may hereafter be convicted of any offense against the State of Mississippi, and is confined in the execution of a judgment of such conviction in the Mississippi State Penitentiary for a definite term or terms of one (1) year or over, or for the term of his or her natural life, whose record of conduct shows that such prisoner has observed the rules of the Penitentiary, and who has served not less than one-fourth (1/4) of the total of such term or terms for which such prisoner was sentenced, or, if sentenced to serve a term or terms of thirty (30) years or more, or, if sentenced for the term of the natural life of such prisoner, has served not less than ten (10) years of such life sentence, may be released on parole as hereinafter provided, except that:

(a) No prisoner convicted as a confirmed and habitual criminal under the provisions of Sections 99-19-81 through 99-19-87 shall be eligible for parole;

(b) Any person who shall have been convicted of a sex crime, and who is otherwise eligible for parole, shall not be released on parole until after he has been examined by a competent psychiatrist or by a competent psychologist selected by the State Parole Board. Such examination must have occurred not more than one (1) year prior to the prisoner's parole hearing. Upon completion of the examination a written report of the psychiatric or psychological examination shall be forwarded immediately to each member of the Parole Board. The written report of the examining psychiatrist or psychologist shall state whether the sex offender is likely or unlikely to commit another sex crime. The Parole Board may also order psychiatric or psychological examinations for persons convicted of other crimes when it determines such examination is necessary to making a parole decision;

(c) No one shall be eligible for parole until he shall have served one (1) year of his sentence, unless such person has accrued any meritorious earned time allowances, in which case he shall be eligible for parole if he has served (i) nine (9) months of his sentence or sentences, when his sentence or sentences is two (2) years or less; (ii) ten (10) months of his sentence or sentences when his sentence or sentences is more than two (2) years but no more than five (5) years; and (iii) one (1) year of his sentence or sentences when his sentence or sentences is more than five (5) years;

(d) No person shall be eligible for parole who shall, on or after January 1, 1977, be convicted of robbery or attempted robbery through the display of a firearm until he shall have served ten (10) years if sentenced to a term or terms of more than ten (10) years or if sentenced for the term of the natural life of such person. If such person is sentenced to a term or terms of ten (10) years or less, then such person shall not be eligible for parole. The provisions of this paragraph (d) shall also apply to any person who shall commit robbery or attempted robbery on or after July 1, 1982, through the display of a deadly weapon;

(2) Notwithstanding any other provision of law, an inmate shall not be eligible to receive earned time, good time or any other administrative reduction of time which shall reduce the time necessary to be served for parole eligibility as provided in subsection (1) of this section; however, this subsection shall not apply to the advancement of parole eligibility dates pursuant to the Prison Overcrowding Emergency Powers Act. Moreover, meritorious earned time allowances may be used to reduce the time necessary to be served for parole eligibility as provided in paragraph (c) of subsection (1) of this section.

(3) The State Parole Board shall by rules and regulations establish a method of determining a tentative parole hearing date for each offender taken into the custody of the Department of Corrections from and after January 1, 1987. The tentative parole hearing date shall be determined within ninety (90) days after the department has assumed custody of the offender. Such tentative parole hearing date shall be calculated by a formula taking into account the offender's age upon first commitment, number of prior incarcerations, prior probation or parole failures, the severity and the violence of the offense committed, employment history and other criteria which in the opinion of the board tend to validly and reliably predict the length of incarceration necessary before the offender can be successfully paroled.

(4) Any inmate within twenty-four (24) months of his parole eligibility date and who meets the criteria established by the classification committee shall receive priority for placement in any educational development and job training programs. Any inmate refusing to participate in an educational development or job training program may be ineligible for parole.

SOURCES: Codes, 1942, § 4004-03; Laws, 1944, ch. 334, § 2; 1946, ch. 486, § 2; 1950, ch. 524, § 4; 1958, ch. 233, § 2; 1964, ch. 366; 1976, ch. 440, § 79; 1976, ch. 470, § 5; 1980, ch. 511; reenacted 1981, ch. 405, § 92; 1982, ch. 431, § 1; reenacted, 1984, ch. 471, § 102; 1985, ch. 490, § 10; 1985, ch. 531, § 3; reenacted and amended, 1986, ch. 413, § 102; 1986, ch. 435, § 1; 1989, 1st Ex Sess, ch. 3, § 4; 1993, ch. 443, § 1, eff from and after July 1, 1993.

Cross references—

Penalty of life imprisonment without parole for sale of specified quantities of certain drugs, see § 41-29-139.

Availability of parole to persons convicted under the Uniform Controlled Substances Law or prior law superseded thereby, see § 41-29-149.

Advancement of parole eligibility dates during periods of prison overcrowding, see §§ 47-5-701 through 47-5-729.

Prison Overcrowding Emergency Powers Act, see §§ 47-5-701 through 47-5-729.

Good time, see §§ 47-5-138 et seq.

Exclusivity of State Parole Board's responsibility for granting or revoking parole, as provided by this section, see § 47-7-5.

§ 99-19-23. Sentence—credit for time of prisoner's confinement.

The number of days spent by a prisoner in incarceration in any municipal or county jail while awaiting trial on a criminal charge, or awaiting an appeal to a higher court upon conviction, shall be applied on any sentence rendered by a court of law or on any sentence finally set after all avenues of appeal are exhausted.

SOURCES: Codes, 1942, § 2540.5; Laws, 1968, ch. 382, § 1, eff from and after passage (approved April 11, 1968).

Research and Practice References—
24B CJS. Criminal Law §§ 1995(5), 1995(6).

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Mr. Eddie M. Lucas
Commissioner
Mississippi Department of Corrections
723 North President Street
Jackson, Mississippi 39202

Dear Commissioner Lucas:

Attorney General Mike Moore has received your letter dated May 20, 1993 and has assigned it to the undersigned for research and reply. Within the letter you request an official Attorney General's opinion concerning the following as it was stated:

Facts:
Senate Bill 2294 passed in the 1993 regular session and approved by the Governor changed Section 47-7-3(c) of the Mississippi Code of 1972 annotated by adding or sentences to the word "sentence." Their language would seem to change the reasoning used on prior opinions (1986-Gibbs, 1992-Perkins) as to whether to allow time computation for parole on the aggregate total of consecutive sentences rather than on each individual sentence.

My questions are:

1) Should the MDOC begin July 1, 1993 computing time for parole on the aggregate total of consecutive sentences rather than on each individual sentence.
2) Should this apply to all inmates or only to those sentenced after July 1, 1993.

It is correct to consider the prior opinions of this office as guidance in answering the posed questions. The opinion of June 22, 1992 by Roy Perkins, Special Assistant Attorney General, referenced an earlier opinion, dated June 12, 1986 addressed to

the Commissioner in which this office considered the time at which an inmate is eligible for parole. The language of Mississippi Code Ann. Section 47-7-3(1)(c) was contemplated, as that section states:

"No one shall be eligible for parole until he shall have served one (1) year of his sentence, unless such person has accrued any meritorious earned time allowance, in which case he shall be eligible for parole if he has served (i) nine (9) months of his sentence, when his sentence is two (2) years or less; (ii) ten (10) months of his sentence when his sentence is more than two (2) years but no more than five (5) years; and (iii) one (1) year of his sentence, when his sentence is more than five (5) years; ..."

Thus, the opinion explained that

"It is important to note in this section that the word "sentence" is singular (rather than plural as in "terms of sentence" which is found at Section 47-7-3(1). Therefore, it is the opinion of this office that an inmate must serve one year of each consecutive sentence before he is eligible for parole. For example, if an inmate has two consecutive sentences of two years each, he would have to serve one year on each sentence for a total of two years before he would be eligible for parole. (Note: This would not apply in cases where an inmate may receive meritorious earned time or when the Governor uses the Emergency Powers Act)."

Again, on June 22, 1992, this office wrote an opinion concerning commutation of an offender's sentence. It relied upon the above in response to two questions raised about the statutory treatment of consecutive sentences. MCA Section 47-5-139(2) was cited as the authority which provides, "an offender under two (2) or more consecutive sentences shall be allowed commutation based upon the total term of the sentences." (emphasis mine) Note that the word "sentences" is plural in this statute. The opinion was reasonod,

"My response to question 4(a) is that an individual with two (2) consecutive life sentences must serve ten (10) years on each sentence before he is eligible for parole. See: Ezra Prater v. State of Mississippi, 579 So. 2d 569 (Miss. 1991) and Section 47-7-3(1). With reference to question 4(b), an individual serving a life sentence and thirty (30) years consecutive must likewise serve ten (10) years on each sentence before he is eligible for parole."

Ever since 1942, ambiguities in sentencing orders, pertaining to multiple sentences, should be construed in favor of the convict. See eg. Anderson v. State, 288 So.2d 852 (Miss. 1974). An

example of how this rationale is applied to ambiguous statutory language concerning prisoner sentences is found in yet a third Attorney General's opinion, that of August 19, 1985, addressed to the Commissioner of Corrections. It was explained that amendments in 1983 changed MCA Section 99-19-21 by removing the mandatory consecutive sentence provisions and make it totally discretionary with the sentencing judge as to whether multiple sentences would run concurrently or consecutively. Therefore, the following statement was made to apply the aforementioned Anderson case logic to that situation:

"The statutory mandate of consecutive sentences having been removed, it is the opinion of this office that the Supreme Court would now hold that a sentencing order entered on or after March 14, 1983, imposing a second or subsequent sentence, that is silent as to whether said sentence is to be served concurrently or consecutively with the previous sentence or sentences is ambiguous under the Anderson doctrine, requiring that it be construed in favor of the convict as a concurrent sentence."

Such opinion would indicate that where there is uncertainty as to whether an order of the court is concurrent or consecutive with the previous sentence or sentences (Plural), then ambiguity is present, thus requiring application of the Anderson doctrine and construction of the matter in favor of the convict.

When this doctrinal view is coupled with the rule of law found within the United States Supreme Court case of Weaver vs. Graham, 450 U.S. 24, 67 L.Ed.2d 17, 101 S. Ct. 960 (1981), wherein it is held impermissible for a state to enact any law which imposes a punishment for an act which is not punishable at the time it was committed, or to impose additional punishment to that which was then prescribed, then it is reasonable to conclude that ambiguous language within the context of statutes affecting prison sentencing is to be beneficially interpreted.

Senate Bill 2294 of the 1993 Regular Legislative Session was enacted to amend Section MCA 47-7-3 to provide that certain inmates shall receive priority for placement in any education development or job training program prior to parole. Subsection (1)(c) of the Bill brought forward the original language of the paragraph, but periodically added the phrase, "or sentences".

The subsection, with amendment, appears thusly,

"(c) No one shall be eligible for parole until he shall have served one (1) year of his sentence, unless such person has accrued any meritorious earned time allowances, in which case he shall be eligible for parole if he has served (i) nine (9) months of his sentence or sentences, when his sentence or sentences is two (2) years or less; (ii) ten (10) months of his

sentence or sentences when his sentence or sentences is more than two (2) years but no more than five (5) years; and (iii) one (1) year of his sentence or sentences when his sentence or sentences is more than five (5) years;..."

It is important to again note within this subsection, now amended, that the word sentence (singular) is accompanied by "or sentences" which indicates inclusion of the plural, or more than one sentence. This additional phrase is similar to the phraseology used in paragraph (1) of that same section, Section 47-7-3, which uses "term or terms for which such prisoner was sentenced." As discussed earlier, the phrase, "term or terms of sentence," was referred to as being plural by the June 22, 1992 - Roy Perkins - opinion of the Attorney General. It is both reasonable and consistent with the prior opinions to simply apply constructive statutory agreement by using the plural "or sentences" in the same vein as "or terms of sentence" to include plural (multiple) events. In so doing, ambiguousness is erased and a clear meaning emerges which allows us to properly construe the subsection.

With this understanding, it can now be said that subsection (1)(c) means that on or after July 1, 1993, the effective date of Senate Bill 2294, that no one shall be eligible for parole until he shall have served one (1) year of his sentence, unless such person has accrued any meritorious earned time allowances, in which case he shall be eligible for parole if he has served (i) nine (9) months of his sentence or sentences (multiple), when his sentence or sentences (multiple) is two (2) years or less; (ii) ten (10) months of his sentence or sentences (multiple) when his sentence or sentences (multiple) is more than (2) years but no more than five (5) years; and (iii) one (1) year of his sentence or sentences (multiple) when his sentence or sentences (multiple) is more than five (5) years;...

Further reaction for a clearer meaning allows us to read the subsection in this manner: (1)(c) No one shall be eligible for parole until he shall have served one (1) year of his sentence, unless such person has accrued any meritorious earned time allowances, in which case he shall be eligible for parole if he has served (i) nine (9) months of his (multiple) sentences, when his (multiple) sentences is (are) two (2) years or less; (ii) ten (10 months of this (multiple) sentences when his (multiple) sentences is (are) more than two (2) years but no more than five (5) years; and (iii) one (1) year of his (multiple) sentences when his multiple sentences is (are) more than five (5) years; ...

Consequently, the abbreviated meaning of the subsection may be determined to simply be: To be eligible for parole, a prisoner must serve at lease one year of his sentence unless he has accrued earned time allowance which would allow parole eligibility according to the following:

(i) for sentences totalling two years or less - nine (9) months;

(ii) for sentences totalling more than two years but no more than five years - ten (10) months; and

(iii) for sentences totalling more than five years - one (1) year.

However, there are certain other necessary restrictions placed upon parole eligibility by other subsections of MCA Section 47-7-3 which are not discussed here because the focus of your inquiry was upon the proper application of the amendment made to subsection (1)(c).

We believe that the above is sufficient to explain the answers to your questions in that, (1) on or after July 1, 1993, the Department of Corrections should compute parole eligibility pursuant to subsection (1)(c) of MCA section 47-7-3, by combining the total of consecutive sentences whenever the prisoner has accrued any meritorious earned time allowances; and (2) such computation should apply to all inmates provided it is beneficial to the individual and is otherwise not a punishment for an act which is not punishable at the time it was committed, nor imposes additional punishment to that which was then prescribed. Weaver v. Graham, supra.

I trust this is responsive to your inquiry.

Sincerely,

MIKE MOORE, ATTORNEY GENERAL

By:
R. Steven Coleman
Special Assistant Attorney General

RSC:eje

ATTACHMENT: Opinions of June 22, 1992;
June 12, 1986; and
August 19, 1985

06-22-92

Mr. Eddie Lucas
Commissioner
Mississippi Dopartment of Corrections
723 North President Street
Jackson, Mississippi 39202

Re: Senate Bill 2030,
1992 Regular Legislative Session

Dear Mr. Lucas:

Attorney General Mike Moore has received your request for an opinion and has assigned it to the undersigned for research and reply. In your letter, you state:

1. If an inmate was sentenced to the Mississippi Department of Corrections prior to Senate Bill 2030 becoming law, is it legally permissible for such inmate to remain in an Earned Time Class as allowed under the old law? Was it the legislative intent to abolish Earned Time Classes completely as of May 14, 1992?

2. Specifically, if an inmate was sentenced to the Mississippi Department of Corrections prior to May 14, 1992, can the Agency legally allow the inmate to receive an earned time allowance of one-half (1/2) of the period of confinement imposed by the court plus any meritorious earned time he may have earned or must the Agency continue to provide the inmate with earned time credit under the old Earned Time Class system until they are officially discharged from the Mississippi Department of Corrections?

3. Subsection 2 of Section 47-5-138 in Senate Bill 2030 provides in part that "if an inmate commits a violation felonious in nature, he may forfeit all or part of the earned time allowance upon the written order of the commissioner". My question is as follows: Is the Agency authorized to forfeit earned time allowance of an inmate for any other justified reason other than for an act felonious in nature?

4. Finally, Subsection (2) of Section 47-5-139 in Senate Bill 2030 provides that "an

offender under two or more consecutive sentences shall be allowed computation based upon the total term of the sentences". In regard to this, my questions are as follows:

(a) If an individual is sentenced to two (2) consecutive life sentences, is he required to serve ten (10) years on each life sentence before being eligible for parole or would such individual be eligible for parole after ten (10) years service?

(b) If an individual is sentenced by the court to life and a definite term of sentence (life and 30 years consecutive), would such person be required to serve only ten (10) years on the life sentence plus ten (10) years on the thirty year sentence?

In response to question number 1, it is our opinion that it is the intention of the state legislature that earned time classes must be completely abolished as of May 14, 1992 which is the date Senate Bill 2030 became law; and, inmates shall not remain in earned time classes after May 14, 1992. See Section 47-5-139, Mississippi Code of 1972, as amended. Accordingly, it is the opinion of our office that it is not legally permissible for inmates to remain in earned time classes after May 14, 1992 because there is no statutory authority.

In response to question number 2, Senate Bill 2030 states, in part, that "an inmate shall be eligible to receive an earned time allowance of one-half (1/2) of the period of confinement imposed by the court except those inmates excluded by law". See Section 47-5-139(1), Mississippi Code of 1972, as amended, for those inmates that are not eligible for the earned time allowance. The bill further states, "The department shall determine a conditional earned time release date by subtracting the earned time allowance from an inmate's term of sentence and shall prepare a conditional earned time release date for each inmate." Under former Section 47-5-138(1), the maximum earned time allowances and/or meritorious earned time allowances were one-half (1/2) of the period of time imposed by the court. As the new earned time allowance totals one-half (1/2) of the period of confinement imposed by the court, no inmate could have received a greater reduction under prior law. Since the legislature has completely abolished earned time classes, no state inmate shall be granted any earned time credit after May 14, 1992 under the earned time classes that were in existence prior to such date. Therefore, it is the opinion of our office that the Department of Corrections is required by law to grant

all eligible inmates, regardless of the date of being committed to the department, an earned time allowance of one-half (1/2) of the period of confinement imposed by the court plus any meritorious earned time authorized by the Commissioner of Corrections. The meritorious earned time shall be awarded pursuant to Section 47-5-142, Mississippi Code of 1972, as amended.

With reference to question number 3, I must make reference to a prior opinion issued by our office dated September 1, 1989 to former Corrections Commissioner, Dr. Lee Roy Black. (See attached.) In that opinion, we stated, in part, that the Classification Committee is given the responsibility to make decisions and hear evidence in all cases where an offender is subject to being demoted or having earned time taken from him. See Section 47-5-104. Under Section 47-5-138 (2) before May 14, 1992, the Commissioner of Corrections or his designee could suspend an inmate from receiving earned time for a specified period and could forfeit up to one-half (1/2) the earned time allowance of an inmate for a serious violation of prison rules. Since May 14, 1992, the effective date of Senate Bill 2030, if an inmate commits a violation felonious in nature, he may forfeit all or part of the earned time allowance upon the written order of the commissioner. Accordingly, it is the opinion of our office that earned time may only be forfeited if an inmate commits a violation felonious in nature and for any escape under Section 47-5-139(3).

In response to question number 4 (a) and (b), I must make reference to another prior opinion issued by our office dated June 12, 1986 to Mr. Morris L. Thigpen, a former Commissioner of the Department of Corrections. (See attached). My response to question 4 (a) is that an individual with two (2) consecutive life sentences must serve ten (10) years on each sentence before he is eligible for parole. See: Ezra Prater v. State of Mississippi, 579 So.2d 569 (Miss. 1991) and Section 47-7-3(1). With reference to question 4 (b), an individual serving a life sentence and thirty (30) years consecutive must likewise serve ten (10) years on each sentence before he is eligible for parole.

I trust this is responsive to your inquiry.

Sincerely,

Mike Moore, Attorney General

By: Roy A. Perkins
Special Assistant Attorney General

MM/RAP:jb
Attachments

SENTENCE COMPUTATION DATA SHEET

NAME GARLOTTE, HARVEY
NO. X60710
SMCI
P. O. BOX 1419
LEAKSVILLE, MS 39451

TOTAL TERM OF SENTENCE LIFE

DATE OF SENTENCE 9-16-1985

JAIL TIME RECORD 5DAYS & 102DAYS & 1DAY

SENTENCE BEGAN 9-11-1985/6-1-1985/5-31-1985

MAXIMUM DISCHARGE DATE LIFE

EARNED TIME ALLOWANCES (50% SENTENCE) 1YR. 6MONTHS

M.E.T. ALLOWANCE 180DAYS
(MET forfeited shall not be restored nor shall it be re-earned by the offender)

EXECUTIVE TIME ALLOWANCE

TIME OUT ON ESCAPE CREDIT ALLOWED FROM (DATE)

TIME OUT ON PAROLE

CREDIT ALLOWED FROM(DATE)

EARNED TIME FORFEITED

MET FORFEITED

EARLIEST PAROLE ELIGIBILITY DATE 12-2-1995

EARLIEST CONDITIONAL DISCHARGE DATE LIFE

EXCLUSIONS:

1. LIFE SENTENCE (X)
2. HABITUAL OFFENDER ( )
3. EARNED TIME ALLOWANCE FORFEITED BY ORDER OF THE COMMISSIONER: ( )
4. SEX OFFENDER(S) DENIED PAROLE BASED ON PSYCHOLOGICAL/PSYCHIATRIC EXAMINATION: ( )
5. MANDATORY ARMED ROBBERY SENTENCE ( )

CONDITIONS:

TIME COMPUTATION OF CONSECUTIVE SENTENCE IS BASED ON EACH INDIVIDUAL SENTENCES.

NO INMATE IN ANY EVENT SHALL HAVE HIS SENTENCE TERMINATED BY ADMINISTRATIVE EARNED TIME ACTION UNTIL HE IS ELIGIBLE FOR PAROLE.

11-13-1992PS
DATE

APPENDIX-T

(MS.) CHRISTINE HOUSTON
CHIEF RECORDS OFFICER

SENTENCE COMPUTATION DATA SHEET

NAME Harvey Garlotte

NO X60710
Unit 29
Parchman, Ms. 38738

TOTAL TERM OF SENTENCE LIFE & LIFE CC/63 yrs.CS=LIFE

DATE OF SENTENCE 9-16-1985

JAIL TIME RECORDED 5 & 102 & 1 days

SENTENCE BEGAN 9-11-1985/6-1-1985/5-31-1985

MAXIMUM DISCHARGE DATE LIFE

EARNED TIME RECORD

Class IV 8-22-1988 (00000) Class III (8 days per mo.)

Class II (20 days per mo.) Class I 9-1-1988 (30 days per mo.)

Disciplinary Action On RVR #202-12(9-2-18)

APPLICABLE TO CLASS II AND CLASS III RESIDENTS, ONLY

EARNED TIME AS RECORDED THROUGH

Total Amount of Time Accumulated

Current Discharge Date

MERITORIOUS EARNED TIME

Days Credited

Posting Period

Total MET Applied

Maximum amount of time that can be accumulated if continuously confined 481 days.

Between 10-16-1985 and 2-3-1987

EARLIEST POSSIBLE DISCHARGE DATE IF CONTINUOUSLY CONFINED: LIFE

Time lost for Disciplinary Action days

Total amount of time lost on this sentence days.

Earned Time Restored days Total Earned Time Restored on sentence days.

THE AMOUNT OF EARNED TIME ACCUMULATED IS CONTINGENT UPON:

1. Class Status
2. Continuous confinement
3. Disciplinary Action (loss of earned time, stoppage and/or class demotion)
4. Conditions applicable to sentence under State Statute, (this applies to certain drug charges, armed robbery and attempted armed robbery offenses.)
5. No earned time can be accumulated if sentenced as an habitual offender.

IMPORTANT:

The above information is based on your present status and is subject to change at any given time. Earned time will be discontinued the date of release and your discharge date will be adjusted to allow you only the amount of time that could be accumulated prior to release.

PAROLE ELIGIBILITY DATES

Minimum Time Required by Statute 5-1-1996 . PRESUMPTIVE PAROLE DATE

SER 999999 . (Parole Board Action) .

WR 9999999 .

Fine, Court Cost, Restitution Outstanding

This must be paid or an acceptable schedule of payment submitted to the Court prior to release on the above date. Failure to comply with the Orders of the Court in this regard could result in service of maximum term of sentence.

Director of Records
Records Department
Mississippi State Penitentiary
Parchman, Mississippi 38738

Date October 19, 1988 nb

APPENDIX-U

PS

SENTENCE COMPUTATION RECORD

NUMBER X60710

NAME CARLOTTE, HARVEY COUNTY MARION/LAMAR

DATE OF ARREST

DATE RELEASED ON BOND

TERM OF SENTENCE:

LIFE & LIFE CC &

3YRS. CS

NUMBER OF DAYS JAIL TIME ALLOWED 5DAYS & 102DAYS & 1DAY

DATE RECEIVED 10-1-1985

DATE OF SENTENCE 9-16-1985

SENTENCE BEGIN 9-11-1985/6-1-1985/5-31-1985

TOTAL SENTENCE

LIFE

MAXIMUM DISCHARGE DATE LIFE

Minimum Discharge Date on 3 year sentences (NOT TO BE DISCHARGED PRIOR TO 8 MOS. CONFINEMENT.)

DATE	CLASS	CREDITS ALLOWED	CREDITS FORFEITED	CREDITS RESTORED	SER DATE	EARLIEST WORK-RELEASE DATE	EARLIEST PAROLE DATE	DISCHARGE DATE
9-16-1985		50% OF	THREE(3 YR)SENTENCE		SENATE BILL #2030		9-11-1986	3-11-1987
7-1-1986		ADDITIONAL 102DAYS JAIL TIME FROM					6-1-1986	11-29-1986
9-4-1986		6-6-1985 TO 12-1-1984 ADDITIONAL 1DAY JAILTIME ALLOWED FROM 12-10-1984 TO 12-11-1934					5-31-1986	11-28-1986
11-13-1992		180DAYS MERITORIOUS EARNED TIME					12-2-1985	6-1-1986
9-16-1985		ADDITIONAL LIFE & LIFE CC SENTENCE					12-2-1995	LIFE

94-6790

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

NO. _____

HARVEY F. GARLOTTE,
PETITIONER

VS.

KIRK FORDICE,
RESPONDENT

Supreme Court, U.S.
FILED
NOV 7 1994
OFFICE OF THE CLERK

PROOF OF SERVICE

I, Harvey F. Garlotte, do hereby certify that I have this date, November 3rd, 1994, caused a true and correct copy of the accompanying Motion for Leave to Proceed In Forma Pauperis, Petition for Writ of Certiorari, and Motion for Appointment of Counsel, to be mailed to the Honorable Mike Moore, Mississippi Attorney General and counsel for the Respondent, Kirk Fordice, at P.O. Box 220, Jackson, MS 39205-0220, via United States Postal Service, First Class Postage prepaid, by delivering those pleadings to the prison law librarian for mailing.

I hereby affirm under penalty of perjury that the above facts and matters are true and correct as stated herein.

Harvey F. Garlotte

Harvey F. Garlotte, pro se
X60710, SMCI U-14
P.O. Box 1419
Leakesville, MS 39451

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